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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1979

SCM CORPORATION,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 12, 1980

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statutes Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 7 |
| I. The Court of Appeals Erred in Extending on "Policy" Grounds the Substantive Liability Provision of Section 8 of the Clayton Act to Corporations Where the Express Language of the Statute Is Limited to Individual Directors, Where There Is No Clear Legislative History Supporting Such an Extension, and Where Such an Extension Is Not Necessary to Effectuate the Purposes of the Statute | 7 |
| II. The Court of Appeals Erred in Affirming the FTC's Entry of a Permanent Injunction Against SCM Without Compliance With the Evidentiary Standard Articulated by This Court in *Grant* | 10 |
| III. The Court of Appeals Erred in Affirming the FTC's Imposition of a Much Broader Cease and Desist Order on SCM Than on Kraftco for the Same Violation Where the Commis- | |

PAGE

sion Provided No Explanation for So Doing and Where the Only Reason for Treating the Two Respondents Differently Is the Commission's Apparent Interest in Punishing SCM for Exercising Its Due Process Right to a Hearing ..... 14

Conclusion ..... 16

TABLE OF AUTHORITIES

*Cases*

*Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 518 F.2d 990 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977) ..... 15

*Beall Construction Co.* v. *Occupational Safety and Health Review Commission*, 507 F.2d 1041 (8th Cir. 1974) ..... 15

*Blackledge* v. *Perry*, 417 U.S. 21 (1974) ..... 14

*Bouie* v. *City of Columbia*, 378 U.S. 347 (1964) .. 8

*Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973) .... 14

*Clark* v. *Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974) .... 15

*Dan J. Sheehan Co.* v. *Occupational Safety and Health Review Commission*, 520 F.2d 1036 (5th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) .. 14-15

*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1975) 7

*FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972) ..... 15

*Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944) ..... 13, 15

*Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964) ..... 9

PAGE

*In re TRW, INC.*, 93 F.T.C. 325 & 372 (1979), *petition for review pending, TRW INC.* v. *FTC*, (No. 79-7209, 9th Cir.) ..... 7

*Marco Sales Co.* v. *FTC*, 453 F.2d 1 (2d Cir. 1971) 16

*National Association of Women's and Children's Apparel Salesmen, Inc.* v. *FTC*, 479 F.2d 139 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973) .. 15

*North Carolina* v. *Pearce*, 395 U.S. 711 (1969) .. 14

*Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975) ..... 13, 15

*SCM Corporation* v. *Federal Trade Commission*, 565 F.2d 807 (2d Cir. 1977) ..... *passim*

*SCM Corporation* v. *Federal Trade Commission*, 612 F.2d 707 (2d Cir. 1980) ..... *passim*

*Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954) ..... 16

*SEC* v. *Bausch & Lomb, Inc.*, 565 F.2d 8 (2d Cir. 1977) ..... 13

*SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801 (2d Cir. 1975) ..... 13

*SEC* v. *Parklane Hosiery Co., Inc.*, 558 F.2d 1083 (2d Cir. 1977) ..... 13

*United States* v. *Great Northern Railway Co.*, 343 U.S. 562 (1952) ..... 7-8

*United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953) ..... *passim*

***Statutes***

Clayton Act, § 8 (15 U.S.C. § 19) ..... *passim*

Clayton Act, § 11 (15 U.S.C. § 21) ..... 3, 9

28 U.S.C. § 1254 ..... 2

PAGE

*Legislative Materials*

38 Stat. 732-33 ..... 8

49 Stat. 718 ..... 8

H.R. Rep. No. 627, Part 1, 63d Cong., 2d Sess. 19-20 ..... 8

H.R. Rep. No. 627, Part 2, 63d Cong., 2d Sess. 2011 ..... 8

H.R. Rep. No. 627, Part 3, 63d Cong., 2d Sess. 9 ..... 8

*Other Authorities*

Kramer, "Interlocking Directorships and the Clayton Act After 35 Years," 59 Yale L.J. 1266 ..... 10

Wilson, "Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act", 45 Antitrust L.J., Issue 2, 317 ..... 10

Federal Trade Commission Rules of Practice § 2.21 4

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# Supreme Court of the United States

**October Term, 1979**

No. 79-

SCM CORPORATION,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner SCM Corporation ("SCM") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 14, 1980.

### Opinions Below

The opinion of the Court of Appeals is reported at 612 F.2d 707 (78-79a)*. That opinion denied SCM's petition for review and enforced the opinion and order of the Federal Trade Commission ("FTC" or "Commission"), reported at 92 F.T.C. 416 (68-77a), which was entered after the case had been remanded by the Court of Appeals' earlier decision, reported at 565 F.2d 807 (51-

* The opinions below are reproduced in a separate appendix submitted with this petition and page references are to that volume.

65a), which granted SCM's petition for review of the original Commission opinion and order, reported at 89 F.T.C. 60 (32-50a). The latter opinion affirmed, with certain modifications, the initial decision and order of the Administrative Law Judge ("ALJ"), reported at 89 F.T.C. 46 (4-26a).

## Jurisdiction

The judgment of the Court of Appeals was entered on January 14, 1980. This petition for a writ of certiorari is being filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## Question Presented

Did the Court of Appeals err in affirming the FTC's entry of a broad cease and desist order against SCM because:

(a) Section 8 of the Clayton Act, while by its terms prohibiting an individual from simultaneously serving on the boards of directors of competing corporations, does not provide that an involved corporation violates the Act or may be enjoined thereunder.

(b) The FTC entered its order without making the required evidentiary showing that relief was needed—circumventing the standard for injunctive relief ("cognizable danger of recurrent violation") established by this Court in *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953), by the device of inferring such a danger from the fact of a past violation alone and then shifting the burden of proof to the respondent to disprove the need for an injunction.

(c) The FTC has imposed a much broader cease and desist order on one of two similarly situated respondents for no reason other than to punish that respondent for exercising its due process right to a hearing and to deter others in the future from a similar exercise.

## Statutes Involved

Sections 8 and 11 of the Clayton Act, 15 U.S.C. §§ 19 and 21 are set forth in relevant part as an addendum to this petition.

## Statement of the Case

This action was commenced by the FTC's service of a complaint on Richard C. Bond ("Bond"), Kraftco Corporation ("Kraftco") and SCM on July 22, 1975, alleging that the simultaneous service of Bond on the boards of directors of Kraftco and SCM violated Section 8 of the Clayton Act, 15 U.S.C. § 19, because the corporate respondents were competitors in the manufacture and sale of margarine, edible oils and barbecue sauce. The FTC's complaint asserted no improper or unlawful conduct by any of the respondents, other than the alleged interlocking directorship. There were no allegations of unfair trade practices or other anticompetitive conduct. Nor was there any allegation of a "cognizable danger of recurrent violation"—a pleading omission that was deliberately maintained even after the ALJ called it to the Staff's attention at the outset of the proceedings.*

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* The ALJ warned the Staff concerning its failure to allege in the complaint a "cognizable danger of recurrent violation":

> "Given this language, the Supreme Court's opinion of W.T. Grant, don't you [Staff Counsel] have a defective complaint in this case?"

*(footnote continued on following page)*

Bond voluntarily resigned from the SCM board on August 1, 1975, within ten days after the FTC complaint was served. Thereafter, Bond and Kraftco agreed to the entry of consent orders by the FTC (1-3a & 27-31a).

The basic facts in this case have never been in dispute and were incorporated into a stipulated record. From the outset, SCM has acknowledged that: Mr. Bond simultaneously served on the SCM and Kraftco boards in 1975; with respect to certain products (less than 7% of their sales), SCM and Kraftco were in competition; and, accordingly, there had been a violation of Section 8 of the Clayton Act—albeit a violation which the Commission acknowledged in its original opinion had probably not been intentional (45a).

SCM urged that there was no statutory authority for entry of an injunction against SCM since Section 8 provided for entry of orders only against an individual director and not against a corporation. SCM also argued that there was no need for an injunction and that the Staff had not met its burden of proof under the *Grant* standard. Nonetheless, SCM offered the Commission its voluntary assurance of future compliance with the statute.*

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*(footnote continued from preceding page)*

Staff Counsel responded by stating:

> "The Justice Department is not operating under the same standards of the Clayton Act that the Federal Trade Commission operates.
>
> "The Justice Department has to enjoin further violations. Therefore, it is arguable that the Justice Department has to show that there is threat of future violation. The Federal Trade Commission, on the other hand, is required to enter an order to cease and desist once a violation is found." (Transcript of Proceeding on December 19, 1975 at 24-26).

* Such a voluntary assurance of future compliance was specifically contemplated by Section 2.21 of the Commission's Rules of Practice then in effect.

Without objecting to the nature or adequacy of SCM's voluntary assurance of compliance, the Staff simply took the position that only a formal order would be acceptable. The Staff maintained that the mere fact of a past violation, without more, justified the FTC's entry of a permanent injunction against SCM and that, once the fact of a past violation was established, it was SCM's burden to prove that an injunction was unnecessary (*see* Complaint Counsel's Brief on Appeal to the Commission at 22).

Both the ALJ and the Commission adopted the Staff's position *in toto* (19-22a & 44-46a) and entered a cease and desist order against SCM far broader than the order consented to with Kraftco.

SCM petitioned for review. The Court of Appeals, while rejecting SCM's position as to the FTC's lack of authority under Section 8 to enter orders against corporations, upheld SCM's position regarding the standard for injunctive relief and remanded because "the Commission seems to have applied an erroneous standard and confused SCM's burden on the defense of mootness with the FTC staff's burden of showing that an injunction was warranted (62a). The Court directed the parties to "address themselves to the issue whether 'there exists some *cognizable* danger of recurrent violation' [citing *United States* v. *W. T. Grant Co.*, 345 U.S. at 633]" (62a).

The Commission filed a petition for rehearing in which it objected strenuously to the application of the *Grant* standard to Commission injunction proceedings, arguing that invocation of that standard could have "a severe adverse effect on the ability of the Commission to carry out its statutory responsibilities." (Petition for Rehearing and Suggestion for Rehearing *En Banc*" at 2). The petition was denied (66a & 67a).

On remand, the Commission held no hearing and took no additional evidence but based its decision as to the need for permanent injunctive relief against SCM entirely on the original (then three-year-old) record. The Commission dealt with the Court of Appeals' decision by observing that, in its prior opinion, "[o]ur phraseology was plainly infelicitous" (73a). The Commission simply reimposed on SCM the same broad order that it had previously entered (68-71a).

SCM again petitioned for review, arguing, *inter alia,* that the Commission had only paid lip service to the *Grant* standard. SCM pointed out that the Commission had again presumed, without evidentiary support other than the admitted violation, a need for an injunction by creating an "inference of cognizable danger of recurrent violation" (75a) and had again shifted the burden to SCM to disprove the need for injunctive relief by requiring SCM to demonstrate "extenuating circumstances" by way of "rebuttal" (75a).

On January 14, 1980, the Court of Appeals denied SCM's petition for review and sustained the Commission's order even though, SCM respectfully submits, the Commission's analysis indicated that it did not apply the *Grant* standard because of its expressed fear that uniform application of the *Grant* standard to FTC proceedings would undermine its regulatory authority.

## Reasons for Granting the Writ

### I.

**The Court of Appeals Erred in Extending on "Policy" Grounds the Substantive Liability Provision of Section 8 of the Clayton Act to Corporations Where the Express Language of the Statute Is Limited to Individual Directors, Where There Is No Clear Legislative History Supporting Such an Extension, and Where Such an Extension Is Not Necessary to Effectuate the Purposes of the Statute.**

The present case squarely presents an important question of Federal law which was explicitly left open by this Court in *Grant*: "whether corporations can violate § 8, or, for other reasons, be enjoined under the statute." 345 U.S. at 634 n.9.*

Section 8 provides that "[n]o *person* at the same time shall be a *director* . . . " (emphasis added). It does not provide that a corporation is prohibited from electing a director who is also a director of a competitor. Unless basic principles of statutory interpretation, there was no need for the Court of Appeals to go beyond the plain language of Section 8 to determine that its scope was limited to individual directors. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1975) ("[T]he language of a statute controls when sufficiently clear in its context"); *United States* v. *Great Northern Railway Co.*, 343 U.S. 562, 575 (1952) ("It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might

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* The present litigation is not the only recent case in which this issue has arisen. *See In re TRW INC.*, 93 F.T.C. 325 & 372 (1979), *petition for review pending, TRW INC.* v. *FTC* (No. 79-7209, 9th Cir.).

have written.") *See Bouie* v. *City of Columbia,* 378 U.S. 347, 362-63 (1964).

While the Court of Appeals need have gone no farther than the express language of Section 8 to conclude that it does not impose substantive liability on corporations, as distinct from individual directors, a review of the legislative history further supports that conclusion. The legislative history of Section 8 indicates that Congress made a deliberate decision not to subject corporations to substantive liability under that statute. As originally enacted, Section 8 included specific statutory language imposing direct liability on banking corporations for violation of the statute. 38 Stat. 732-33. No comparable provision was provided for industrial corporations. Clearly, Congress could have used the same language that it did use as to banking corporations if it had intended to subject industrial corporations to Section 8. Moreover, in 1935 Congress amended Section 8 by deleting the language that imposed direct liability even on banking corporations. 49 Stat. 718.

A further indication that Congress did not intend Section 8 to impose liability on corporations, as distinct from individual directors, appears in the committee reports which reflect a basic concern about the power of bankers, investment bankers and individuals of great wealth who were thought to control whole industries. Thus, there was concern about the problem of a few powerful "*individuals*" who controlled numerous corporations. H.R. Rep. No. 627, Part 1, 63d Cong., 2d Sess. 19-20 ("The idea that there are only a few *men* in any of our great corporations and industries who are capable of handling the affairs of the same is contrary to the spirit of our institutions") (Emphasis added). H.R. Rep. No. 627, Part 3, 63d Cong., 2d Sess. 9 ("*Persons are prohibited* from acting at the same time as directors . . .") (Emphasis added). *See* H.R. Rep. No. 627, Part 2, 63d Cong., 2d Sess. 2011.

The Court of Appeals, acknowledging that "if the language of the section is considered alone, the result is not clear" (57a), nevertheless held that the substantive prohibition of Section 8 applies to corporations on the ground that "policy supports a broad reading of section 8 and section 11 indicates that such a construction is reasonable" (57a)*.

SCM respectfully suggests that it was improper for the Court of Appeals, based solely upon its own policy judgments, to expand the substantive scope of Section 8. *See Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 395 (1964). The wisdom of the principle that the legislature and not the court is best suited to make policy judgments is borne out in the present case by the inconsistency between the Court's unfounded assumption that "a corporation without fear of sanction could have the concededly prohibited 'interlocking directorate and, if detected, simply replace the ousted director with another interlocking board

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* Section 11 articulates certain of the remedies available for violation of the Clayton Act, including an order requiring a respondent to "rid itself of the directors chosen contrary to the provisions of [Sections 7 and 8 of this Act]." The Court of Appeals apparently accepted the FTC's argument that "[s]ince only a corporation can rid itself of a director, . . . section 8 must apply to corporations as well as to individual directors" (56a). The Court rejected SCM's position that (1) an exclusively procedural section of a statute cannot form the basis for creating a new substantive liability in an entirely separate section of that statute; (2) the express language of Section 11 limits the Commission's cease and desist power to persons "subject to" the substantive liability sections of the Act; and (3) the "rid itself" language of Section 11 appears to be a vestigial remainder from the time when banking corporations were explicitly subjected to substantive liability under Section 8. The Court also rejected SCM's point that, if Section 11 could be read so as to conclude that a corporation can violate Section 8, it follows that the relief available against a corporation for such a violation is limited by the same provision of Section 11 used to infer the liability—*i.e.*—to a cease and desist order requiring the corporation to "rid itself" of the offending director.

member' " (57a) and the actual history of Section 8 enforcement in which voluntary assurances of future compliance were the norm and there is no known instance of any recidivist individual or corporation.*

If Congress had intended that Section 8 impose substantive liability on corporations, it could have explicitly so provided in the statute. Congress did not do so. It was error for the Court of Appeals to rewrite Section 8, on "policy" grounds. It is important to the integrity of Section 8 and the judicial process itself that this Court grant the writ, review and reverse the holding of the Court of Appeals.

## II.

### The Court of Appeals Erred in Affirming the FTC's Entry of a Permanent Injunction Against SCM Without Compliance With the Evidentiary Standard Articulated by This Court in *Grant*.

The controlling standard for entry of an injunction in Section 8 cases was established by this Court in *Grant*, 345 U.S. at 633 ("[T]he moving party must satisfy the court that relief is needed [and] [t]he necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive"). This Court should exercise its power of supervision by reviewing the Commission's departure from that standard.

In its first opinion, the Commission did not apply this standard and improperly shifted the burden of proof to

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* *See* Kramer, "Interlocking Directorships and the Clayton Act After 35 Years," 59 Yale L.J. 1266; Wilson, "Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act," 45 Antitrust L.J., Issue 2, 317.

SCM (46a). The Court of Appeals reversed, holding that the *Grant* standard controlled the Commission's determination of whether SCM's single past violation warranted entry of a cease and desist order (62a).

On remand, the Commission did not reopen the three-year-old administrative record and, therefore, offered no additional evidence as to SCM's propensity to repeat its violation of Section 8. Not surprisingly, the record that it did have contained little more than the fact of SCM's single past violation—since it was closed at a time when the FTC erroneously believed that proof of a past violation alone was sufficient to justify entry of an injunction.*

Having failed to allege a "cognizable danger of recurrent violation," faced with an old record barren of such evidence, and obviously concerned that general application of the *Grant* standard to FTC injunctive proceedings would have "a severe adverse effect" (*see* p. 5, *supra*) on its enforcement authority, the Commission resolved its dilemma by characterizing its error as one of "phraseology" (73a) not substance and then only paying lip service to *Grant* while actually reapplying its own lesser standard for injunctive relief.

The Commission has persisted in applying a "possibility" standard for injunctive relief instead of the "cognizable danger of recurrent violation" standard of *Grant*. The Commission concluded that: "Having acted in this fashion in the past, and given that it continues to do business and elect directors, we believe there is cognizable danger that SCM will again neglect to prevent the election and service

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* The administrative record evidenced the fact of competition between SCM and Kraftco (limited to less than 7% of their sales) and SCM's voluntary assurance of future compliance. On this same record, the Commission had already concluded that SCM's single past violation of Section 8 was not intentional (45a).

of an interlocking director absent an order to deter it" (74a). It hardly follows from the facts that SCM continues to (1) "do business" and (2) "elect directors" that SCM will therefore become a repeat violator of Section 8. Such facts raise at most a "possibility" that SCM might violate Section 8 in the future. If all that is needed to issue an injunction against a corporation or an individual is a past violation plus an intention to remain in business, the cognizable danger of recurrent violation standard will be reduced to a meaningless verbal formula.

The Commission also reverted to its error of shifting the burden of proof to SCM—this time by the formulation of an "inference of cognizable danger of recurrent violation" (75a).

The Commission reasoned as follows. The fact of a past violation plus the facts that the corporation remains in business and continues to hire directors constitute a sufficient basis for entry of a cease and desist order. While entry of a cease and desist order is, therefore, the norm, the Commission might consider omitting such an order "[i]f there are genuinely extenuating circumstances." As to who bears the burden of proving such "extenuating circumstances," the Commission concluded:

> "[T]he corporation is peculiarly well suited to suggest what they are . . . . Absent such rebuttal, the *inference* of cognizable danger of recurrent violation must stand" (emphasis added) (75a).

The Commission's reasoning and approach constitute a circumvention of the standard for injunctive relief and the assignment of the burden of proof articulated by this Court in *Grant*. SCM respectfully suggests that the Court of Appeals erred in concluding that "the correct legal standard

was *applied*" (emphasis added) (79a) as distinct from merely *recited* by the Commission.

Putting "phraseology" aside, what the Commission has actually done is to predicate the automatic issuance of an injunction on the occurrence of a past violation, without proof of a "cognizable danger of recurrent violation." Such an approach conflicts with *Grant** and contravenes the basic philosophy underlying injunctive relief.

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944). *Accord, Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975).

The Commission should not be permitted to enter injunctions, without the requisite evidentiary showing, purely as a matter of administrative routine.

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* *Accord, SEC* v. *Bausch & Lomb, Inc.*, 565 F.2d 8, 18 (2d Cir. 1977) ("It is well settled that the Commission cannot obtain relief without positive proof of a reasonable likelihood that past wrongdoing will recur."); *SEC* v. *Parklane Hosiery Co., Inc.*, 558 F. 2d 1083, 1089 (2d Cir. 1977) ("The Commission cannot obtain injunctive relief where there is no reasonable likelihood of recurrence."); *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975) ("[I]llegal activity, without more, does not automatically justify issuance of an injunction. . . .").

## III.

**The Court of Appeals Erred in Affirming the FTC's Imposition of a Much Broader Cease and Desist Order on SCM Than on Kraftco for the Same Violation Where the Commission Provided No Explanation for So Doing and Where the Only Reason for Treating the Two Respondents Differently Is the Commission's Apparent Interest in Punishing SCM for Exercising Its Due Process Right to a Hearing.**

It is clear from a comparison of the SCM and Kraftco orders (68-71a & 27-31a) that the former is materially broader and more burdensome than the latter.* Throughout these proceedings, SCM has argued that there was no reasonable basis for the Commission's disparate treatment of SCM and Kraftco.

In response, the Commission has taken the position that it is proper to impose a broader and more burdensome order on one of two similarly situated respondents because that respondent cost the Commission "time" and "money" by exercising its Constitutional right to a hearing (49-50a & 79a). SCM respectfully suggests that the Commission has in effect put a "price tag on the exercise of due process rights" (64a) in contravention of fundamental principles of due process as articulated by this Court in *North Carolina* v. *Pearce*, 395 U.S. 711, 723-24 (1969). *Accord, Blackledge* v. *Perry*, 417 U.S. 21, 27-28 (1974), *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 18 (1973).**

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* For the convenience of the Court, a columnar comparison of these orders is set forth as an addendum to this petition.

** Lower courts have extended these principles, originally adopted by this Court in the criminal context, to other areas. *Dan J. Sheehan*

*(footnote continued on following page)*

The Court of Appeals rejected SCM's argument because it found "the differences not sufficiently substantial to raise this constitutional question" (64a). While SCM believes that the Court of Appeals was wrong in concluding that the differences in the orders are not substantial, the basic error in the Court of Appeals' disposition of SCM's argument is its conclusion that the Commission is at all free to discriminate (regardless of whether or not the resulting differences are "substantial") between similarly situated respondents because one chose to exercise its right to a hearing. For the Court of Appeals to sanction such reasoning by the Commission contravenes the "fundamental principle of judicial review of administrative action [which] requires that in order for a reviewing court to sustain agency action the legal grounds upon which the agency acted must be correct." *National Association of Women's and Children's Apparel Salesmen, Inc.* v. *FTC*, 479 F.2d 139, 147 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973). *See FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 248-49 (1972).*

Finally, SCM respectfully suggests that it was a fundamental abuse of discretion, after SCM had specifically

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*(footnote continued from preceding page)*

*Co.* v. *Occupational Safety and Health Review Commission*, 520 F.2d 1036, 1040 (5th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) (administrative context); *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 518 F.2d 990, 1012-13 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977) (administrative context); *Beall Construction Co.* v. *Occupational Safety and Health Review Commission*, 507 F.2d 1041, 1045-46 (8th Cir. 1974) (administrative context); *Clark* v. *Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974) (civil context).

* It was particularly inappropriate for the Commission to choose an injunction as the vehicle for punishing SCM for exercising its right to a hearing since "[t]he historic injunctive process was designed to deter, not to punish." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). *Accord, Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975).

challenged the Commission's entry of a more severe order against it than against Kraftco for the same violation, for the FTC to make no attempt to explain its disparate treatment of the two similarly situated respondents. *Marco Sales Co.* v. *FTC*, 450 F.2d 1, 6-7 (2d Cir. 1971) ("That an administrative agency is obligated to provide petitioner with an explanation for the difference in their treatment, is well established [citing, *inter alia, Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-55 (1954)]").

## Conclusion

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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## ADDENDUM

### Comparison of Kraftco and SCM Orders

| Kraftco Order | SCM Order |
|---|---|
| 1. Kraftco must not permit "any individual to serve on its Board of Directors if such individual is . . . at the same time a director *of SCM* . . . so long as Kraftco and SCM . . . compete." (28-29a) | 1. SCM must not permit on its board "any individual who . . . serves at the same time as a director *of Kraftco,* . . . so long as Kraftco and SCM . . . compete, . . . or serves at the same time as a director *of any other corporation . . . which competes with SCM. . . .*" (69a) |
| 2. "[W]ithin ninety (90) days of . . . service of this order and annually in each of the four (4) years thereafter, Kraftco shall transmit to each member of its Board . . . *a list of the following products: (a) cheese, (b) fluid milk, (c) ice cream, (d) barbecue sauce, (e) edible oils, (f) margarine, and (g) any product in which Kraftco had sales which accounted for 5% or more of Kraftco's gross revenues in the preceding fiscal year;* [*and*] *shall . . . request that each* | 2. "[W]ithin thirty (30) days of the effective date of this order [and annually for five (5) years] SCM . . . shall obtain a written statement from each member of its board . . . showing . . . a listing *of each product or service produced or sold by each corporation* [*of*] *which the director . . . then serves as a director. . . .*" (69-70a) |

| Kraftco Order | SCM Order |
| --- | --- |
| *director . . . certify to Kraftco in writing that he . . . does not serve on the Board . . . of any corporation which [competes] with Kraftco in the manufacture or sale in the United States of any product listed by Kraftco where the sales of such product by the corporation . . . exceed $1,000,000 per year.* (29-30a) | |
| 3. "[F]or a period [of] five (5) years . . ., Kraftco shall not permit on its Board . . . any . . . director who fails to submit a written certification pursuant to Paragraph II above." (30-31a) | 3. "[For a period of five (5) years, SCM] shall not have on [its] board . . . any individual who . . . fails to submit to SCM . . . any statement required by Paragraph Two of this order." [Paras. 1 and 2 of SCM Order]. (69-70a) |
| 4. "[For a period of *(5) years*] Kraftco shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order." (31a) | 4. "[F]or a period of *ten (10) years* . . ., SCM . . . shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. *Copies of the statements obtained pursuant to Paragraph Two of this order shall be submitted* |

| Kraftco Order | SCM Order |
| --- | --- |
| | *to the Commission as part of the reports of compliance required by this Paragraph during this first five (5) years.*" [Para. 3 of SCM Order] (70a) |
| 5. "Kraftco [must] notify the Commission . . . thirty (30) days prior to any change [in corporate form]." (31a) | 5. "SCM . . . shall notify the Commission . . . thirty (30) days prior to any change in the corporation." [Para. 4 of SCM Order] (70-71a) |

## STATUTES

*Clayton Act, § 8, 15 U.S.C. § 19.*

* * * *

"No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a Director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter."

* * * *

*Clayton Act, § 11, 15 U.S.C. § 21.*

* * * *

"(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges

in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued

by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States in the manner provided in subsection (c) of this section."

* * * *

79-1599

No. 79-

Supreme Court, U.S.
FILED
APR 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1979

SCM CORPORATION,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM E. WILLIS
125 Broad Street
New York, New York 10004
*Counsel for Petitioner*

JAMES E. TYRRELL
SULLIVAN & CROMWELL

MILTON WOLSON
SCM CORPORATION
*Of Counsel*

April 12, 1980

TABLE OF CONTENTS


| | PAGE |
|---|---|
| Decision and Order Adopting Agreement Based on Consent Order as to Richard C. Bond ..... | 1a |
| Initial Decision and Order of the Administrative Law Judge ..... | 4a |
| Decision and Order Adopting Agreement Based on Consent Order as to Kraftco Corporation ..... | 27a |
| Opinion and Final Order of the Commission—January 11, 1977 ..... | 32a |
| Opinion of the Court of Appeals, 565 F.2d 807 (2d Cir. 1977) ..... | 51a |
| Order Denying the Commission's Petition for Rehearing—February 15, 1978 ..... | 66a |
| Order Denying the Commission's Petition for Rehearing En Banc—February 15, 1978 ..... | 67a |
| Opinion and Final Order of the Commission—October 4, 1978 ..... | 68a |
| Opinion of the Court of Appeals, 612 F.2d 707 (2d Cir. 1980) ..... | 78a |

## Decision and Order Adopting Agreement Based on Consent Order as to Richard C. Bond

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. D-9035

Commissioners:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
Stephen Nye

In the Matter of
RICHARD C. BOND, an individual.

The Federal Trade Commission having heretofore issued its complaint charging the respondent named in the caption hereto with violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act, and the respondent having been served with a copy of the complaint and with a copy of the notice of contemplated relief accompanying said complaint; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint heretofore issued, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

*Decision and Order Adopting Agreement Based on Consent Order as to Richard C. Bond*

The Commission having thereafter issued an order withdrawing the matter described in the caption hereto from adjudication for the purpose of considering the proposed consent agreement pursuant to Section 3.25 of its Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by interested persons pursuant to Section 3.25(d) of the Commission's Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Richard C. Bond, is an individual.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

1. It Is Ordered that upon this order becoming final Respondent, Richard C. Bond, so long as he remains a director of Krafteo, Inc., (a) shall not resume his position as a director of SCM Corporation, and (b) shall not accept or continue to hold a position as director of any other corporation engaged in or affecting interstate commerce as defined in the Clayton or Federal Trade Commission Acts which is in competition with Krafteo, Inc.

*Decision and Order Adopting Agreement Based on Consent Order as to Richard C. Bond*

2. IT IS FURTHER ORDERED that within thirty (30) days from the date on which this order is served upon him Respondent shall file with the Commission a written report setting forth the manner and form in which he has complied with this order.

By the Commission.

SEAL

Charles A. Tobin,
Secretary

ISSUED: April 26, 1976

## Initial Decision and Order of the Administrative Law Judge

Filed: June 17, 1976

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 9035

In the Matter of
KRAFTCO CORPORATION, a corporation,
SCM CORPORATION, a corporation
and
RICHARD C. BOND, an individual.

### INITIAL DECISION

Morton Needelman, Administrative Law Judge
Ronald A. Bloch, Esq.,
Joseph Tasker, Jr., Esq.,
Counsel Supporting the Complaint.

Sullivan & Cromwell
by William E. Willis, Esq.,
Marcia B. Paul,
New York, New York
Counsel for Respondent SCM Corporation.

### I

### STATEMENT OF THE CASE

The Commission's complaint in this proceeding issued on June 17, 1975. It charges Kraftco Corporation [1] (here-

[1] Incorrectly captioned "Kraftco, Inc." in the complaint. See Answer of Kraftco Corporation, ¶ 2.

inafter "Kraftco"), SCM Corporation (hereinafter "SCM"), and an individual, Richard C. Bond (hereinafter "Bond") with violating Section 8 of the Clayton Act (15 U.S.C. § 19),[2] and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45)[3] by reason of an unlawful interlocking directorate. According to the complaint, Bond served simultaneously on the Board of Directors of Kraftco and SCM which compete in the sale of margarine, edible oils, and barbecue sauce. The complaint further alleges that each corporate respondent has capital, surplus, and undivided profits aggregating more than one million dollars.

Kraftco and Bond have entered into consent settlements.[4] The remaining issue in this case is the liability of SCM.

SCM's answer, dated November 17, 1975, admits certain complaint allegations respecting corporate identity. The answer also admits that SCM's capital, surplus, and individual profit aggregate more than one million dollars and that it is engaged in commerce, as "commerce" is defined

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[2] Section 8 provides as follows with respect to interlocking directorates:

> . . . [N]o person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination, of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

[3] Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition and unfair and deceptive acts or practices.

[4] The Commission accepted a consent settlement from Bond on April 26, 1976. Kraftco's consent agreement was provisionally accepted by the Commission and placed on the public record for 60 days comment on May 6, 1976.

in both the Clayton Act and the Federal Trade Commission Act. SCM's answer denies that Bond was a member of its Board of Directors at the time the answer was filed, but admits that prior to August 1, 1975, he was on SCM's Board. SCM's answer also admits the sale of certain food products, but denies knowledge sufficient to form a belief as to the allegations of the complaint respecting competition between it and Kraftco. SCM's answer then asserts several affirmative defenses, to wit: 1) the complaint fails to state a claim upon which relief could be granted, 2) Bond's resignation from SCM's Board renders the case moot, 3) competition, if any, between Kraftco and SCM is *de minimis* and not within the statutory purpose of the anti-interlock law, 4) the Commission lacks jurisdiction over SCM because Section 8 applies only to individuals and not to the corporations themselves, and 5) respondent's due process and equal protection rights have been violated by the Commission's uneven and discriminatory enforcement of Section 8. Concurrently with the filing of its answer, SCM moved for summary decision on the same grounds as those asserted as affirmative defenses. On December 1, 1975, complaint counsel filed a cross-motion for summary decision.[5]

A prehearing conference was held on December 19, 1975. After hearing oral argument on cross-motions for summary judgment, the Administrative Law Judge suggested that the basic facts of the case should be stipulated and a decision could then be rendered on the basis of the stipulation. The

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[5] Complaint counsel renewed this motion in its Supplementary Memorandum of Law In Support of Complaint Counsel's Motion For Summary Decision and In Opposition to SCM's Motion To Dismiss (May 10, 1976). In view of my disposition of this matter on the merits by relying on a stipulated record, I need not address the summary decision question.

parties agreed to follow this course of action, and on April 29, 1976, a factual stipulation was filed. On May 10, 1976, proposed findings and supporting briefs were filed by both parties, and replies were filed on June 3, 1976.

On the basis of the factual stipulation, uncontroverted affidavits submitted with the cross-motions for summary decision, and the pleadings, I make the following findings of fact:[6]

## II

## FINDINGS OF FACT

1. SCM is a New York corporation with its principal office and place of business located at 299 Park Avenue, New York, New York 10017. (SCM Ans., ¶ 2)

2. SCM is a diversified industrial company which manufactures and distributes various products, including typewriters, business equipment, home appliances, paints, resins, food, chemicals, and paper. In fiscal 1975, SCM had total sales of $1,287,000,000. (Stip., ¶ 1; Sexton, Aff. 1, ¶ 4)

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[6] The following abbreviations are used throughout this initial decision:

"Stip."—Stipulation of April 29, 1976, with ¶ references.

"SCM Ans."—SCM's Answer to Complaint, with ¶ references.

"Kraftco Ans."—Kraftco's Answer to Complaint, with ¶ references.

"Sexton Aff. 1"—Affidavit of Richard Sexton, Vice President and General Counsel of SCM, dated November 11, 1975 and filed with SCM's Motion for Summary Decision Dismissing the Complaint, with ¶ references.

"Sexton Aff. 2"—Affidavit of Richard Sexton, Vice President and General Counsel of SCM, dated December 12, 1975 and filed with SCM's Memorandum of Law in Opposition to Motion by Counsel Supporting the Complaint and In Further Support of Motion by Respondent SCM, with ¶ references.

3. SCM has capital, surplus, and undivided profits aggregating more than one million dollars. (SCM Ans., ¶ 2)

4. SCM is engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act. (SCM Ans., ¶ 2)

5. SCM's business includes the manufacture and sale in commerce of margarine, edible oils, and barbecue sauce. (SCM Ans., ¶ 5; Stip. ¶ 's 2, 3, 4)

6. Kraftco, a corporation engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, has capital, surplus, and undivided profits aggregating more than one million dollars. (Kraftco Ans., ¶ 2) Total Kraftco sales in 1974 were approximately $4,500,000,000. (Sexton Aff. 1, ¶ 4)

7. SCM competes with Kraftco in the sale of margarine, edible oils, and barbecue sauce. Sales by SCM in fiscal 1975 of products sold in competition with Kraftco products were approximately $83 million.[7] During the same period, Kraftco had sales of products in competition with SCM of approximately $258 million. (Stip., ¶ 1) Specifically, SCM and Kraftco competed as follows in 1975:

(a) SCM sold margarine in 41 states in competition with Kraftco. (Stip., ¶ 2)

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[7] SCM's *total* sales of these products in 1975 were approximately $123,552,000, broken down as follows:

$ 643,500—Sales of margarine to industrial bakers
386,100—Sales of margarine to wholesalers
25,740,000—Sales of edible oil to industrial manufacturers of fried snacks
25,740,000—Sales of edible oil to industrial manufacturers of prepared mixes and industrial bakeries
64,350,000—Sales of edible oil to food service industry
6,435,000—Sales of barbecue sauce to retail grocery trade
257,400—Sales of barbecue sauce to food service industry.

(Stip., ¶'s 2, 3, 4)

(b) SCM sold edible oils in competition with Kraftco in all states. (Stip., ¶ 3)

(c) SCM competed with Kraftco west of the Mississippi River in the sale of barbecue sauce. (Stip., ¶ 4)

(d) SCM and Kraftco have placed advertisements for edible oils, margarine, and barbecue sauce in the same trade publications. (Stip., ¶ 5)

8. Bond became a member of SCM's Board of Directors in 1967 and continued as a director until he submitted his resignation on August 1, 1975. (Sexton Aff. 1, ¶ 6) This resignation was accepted by SCM at the August 21, 1975 meeting of the SCM Board of Directors. (Sexton Aff. 2, ¶ 3) Bond joined the Board of Directors of Kraftco sometime in 1957, and he continues to this day to serve on the Kraftco Board. (Sexton Aff. 1, ¶ 6) SCM does not intend to reappoint Bond to its Board of Directors so long as he is a director of Kraftco or any corporation which competes or might compete in any line of commerce with SCM. (Sexton Aff. 1, ¶ 10)

## III

## DISCUSSION [8]

On the basis of the factual stipulation submitted by the parties, there is no question that (1) Bond served simultaneously on the Board of Directors of both SCM and Kraftco;[9] (2) both corporations are engaged in "com-

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[8] References in this Section are to the briefs and reply briefs as follows:

"SCM Main Brief"—Memorandum of Law of Respondent SCM Corporation (May 10, 1976).

"SCM Reply Brief"—Reply Memorandum of Law of Respondent SCM Corporation (June 3, 1976).

[9] Finding 8.

merce" and have capital, surplus, and undivided profits aggregating more than $1,000,000;[10] and (3) the two corporations compete.[11] Respondent SCM, however, contends that there are several defenses to what appears to be an obvious violation of Section 8.

First, respondent says that the Commission lacks jurisdiction over SCM because the prohibitions of Section 8 of the Clayton Act are directed exclusively to individuals. According to respondent, there is nothing in Section 8 which says it is illegal for corporations to have interlocking directors; the statute, respondent asserts, is directed solely to individuals serving on two interlocking corporations. SCM Main Brief pp. 16-23; SCM Reply Brief, p. 8.

While corporations have been held liable in Section 8 proceedings, See, *e.g., United States* v. *Sears, Roebuck and Co.,* 111 F. Supp. 614 (S.D.N.Y. 1953), it is true that in the only Supreme Court decision on the anti-interlock provisions of the Clayton Act, the Supreme Court specifically reserved judgment on the question of corporate liability.[12] Notwithstanding the lack of a definitive Supreme Court holding or the absence of legislative history directly in point, I believe that the language of Section 11(b) of the Clayton Act disposes of respondent's argument. This section says that the Commission shall issue orders requiring a "person" (defined in Section 1 of the Clayton Act as including corporations) to cease and desist from violations of the Act, including Section 8, and to "rid itself of the directors chosen contrary to the provisions of . . . section 8." Since the only "person" that could logically "rid

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[10] Findings 3, 4, and 6.

[11] Finding 7.

[12] *United States* v. *W. T. Grant Co.,* 345 U.S. 629 at 634, n. 9 (1953).

itself" of directors is a corporation, by its terms, the statute gives the Commission jurisdiction over corporations.[13] Despite the clear language of Section 11 respecting the powers of the Commission, respondent argues that this section is merely "procedural" and that only Section 8 "defines" the offense. SCM Main Brief, p. 20. Such a bifurcated reading of this legislation, which would effectively eliminate most of Section 11, conflicts with the accepted principles of construction that separate parts of a single statute should be harmonized and construed together (See *Clark* v. *Uebersee Finanz-Korp.,* 332 U.S. 480, 488 (1947)) and that no parts of a statute are to be denied significance and effect. *Ex Parte Public Bank,* 278 U.S. 101, 104 (1928).

As for respondent's argument that the subject language in Section 11 is a "vestigial" carry-over from the pre-1935 version of Section 8 which expressly prohibited banks from having interlocking directorates (SCM Main Brief, p. 21), not only is this a strained interpretation of inapposite legislative history, but also a strong argument could be made that the 1935 amendments, which were intended to strengthen rather than weaken Section 8 by removing the discretion of the Governors of the Federal Reserve System to allow interlocks (See, STAFF OF ANTITRUST SUBCOMM. OF HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., Report on Interlocks in Corporate Management 23-24

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[13] The section reads, in pertinent part, as follows:

> "If . . . the Commission . . . shall be of the opinion that any of the provisions of said sections [including Section 8] have been or are being violated, *it shall . . . issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act,* if any there be, in the manner and within the time fixed by said order." 15 U.S.C. 21 [Emphasis added]

(Comm. Print 1965)), left intact the power of the Federal Reserve System, as indicated in Section 11, to continue to prohibit banks from having interlocks. In any event, whatever the reach of the Federal Reserve System after the 1935 amendments may or may not be over banks, there is no legislative history cited by respondent which can be even remotely interpreted as saying that one should ignore what Congress expressly said in Section 11 about the jurisdiction of the Federal Trade Commission to enforce Section 8 against corporations.

Moreover, going beyond its plain language, Section 11 cannot be interpreted in such a way as to frustrate the very purpose and objective of Section 8.[14] But this is precisely what would happen if corporations, as respondent urges, could not be held accountable for Section 8 violations. Congress intended by Section 8 "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates." *United States* v. *Sears, Roebuck and Co.,* 111 F. Supp. 614, 616 (S.D.N.Y. 1953). An interpretation of Sections 8 and 11 which allows corporations to seat interlocking directorates, reap the anticompetitive benefits, and then possibly appoint new interlocking directors after each violation is uncovered would transform a statute aimed at preventing full-blown antitrust violations into a license giving corporations multiple opportunities for achieving actual anticompetitive results.

Respondent further contends that even if Section 11 does give the Commission jurisdiction over a corporation, the

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[14] A statute should be construed by looking to its object and underlying policy. As the Supreme Court recently said, "Our objective . . . is to ascertain the Congressional intent and give effect to the legislative will." *Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975).

same section limits relief to an order requiring the corporation to rid itself of the director chosen contrary to the provisions of Section 8 of the Act. SCM Main Brief, p. 20. Respondent then argues that since no unlawful interlocking directorate now exists (Bond resigned from the SCM Board after complaint issued), Section 11 cannot be invoked as the basis for a cease and desist order. This contention also totally ignores the clear language of Section 11 which not only allows the Commission to require a corporation to rid itself of the offending directors, but also authorizes the Commission to issue "an order requiring such person [including a corporation] to cease and desist from such violations." Thus, Section 11 relief is *not* limited to orders simply requiring removal of the director who was a participant in the unlawful interlock, and even if the director *has* been removed, an appropriate order to cease and desist may be entered. In addition, it has been held that Commission's remedial powers under Section 11 to issue a cease and desist order governing future conduct are as broad as its general equitable powers under Section 5 of the Federal Trade Commission Act, and "the question to be asked in fashioning a remedy should be: What kind of order, within the broad range of an equity court's remedial powers, would, in the particular circumstances, be most effective to 'cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'" *Ecko Products Co.*, 65 F.T.C. 1163, 1215 (1964), *aff'd.*, 347 F.2d 745 (7th Cir. 1965).[15]

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[15] While *Ecko* dealt specifically with the question of the power of the Commission to ban future acquisitions under Section 11 after a Section 7 violation has been proven, the decision touched generally on the similarity between a Section 11 cease and desist order (including orders aimed at interlocks) and the remedial scope of Section 5 (See

*(footnote continued on following page)*

Next, respondent argues that issuance of an order in this case is not required because the "nature and magnitude of the competition, such as it is, between SCM and Kraftco, is not 'actual and substantial' as that term has been repeatedly used in the antitrust laws" and that an interlock between SCM and Kraftco, "in no material manner adversely affects [the] public interest." SCM Main Brief, pp. 35-36; SCM Reply Brief, p. 5. This argument misconceives the purpose of Section 8 while at the same time ignoring the stipulated facts.

Given the fact that the parties have stipulated to a competitive overlap between Kraftco and SCM in the sale of margarine, edible oils, and barbecue sauce, the issue of competition has been removed from the case. The statute is violated whenever the technical requirements of "commerce" and jurisdictional amount are met, and the companies are in a competitive relationship where there is a potential for an agreement between them which would violate *any* of the antitrust laws, for example, a division of territory or a price-fix relating to the sale of edible oil. There is no need under this statute to have an elaborate market analysis, and evidence of actual effects on competition is unnecessary. *Protectoseal Company* v. *Barancik,* 484 F.2d 585 (7th Cir. 1973); *United States* v. *Sears, Roebuck and Co.,* 111 F. Supp. 614 (S.D.N.Y. 1953).

On the question of the substantiality of the competitive overlap, the court noted in Sears, Roebuck that Congress

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*(footnote continued from preceding page)*

65 F.T.C. 1215, footnote 9). The decision indicates that *both* statutes are now to be read broadly, not only because of the 1950 amendments to the merger law, but also for the reason that *FTC* v. *Eastman Kodak Co.,* 274 U.S. 619 (1927), which limited the scope of cease and desist orders, has for all practical purposes been overruled by *Pan American World Airways* v. *United States,* 371 U.S. 296, 312 and notes 17, 18 (1963).

had provided Section 8 with "its own substantiality standard in the form of the one million dollar size requirement." [16] But even assuming that there may be some minimum amount of competitive overlap below which no violation should be found,[17] the issue simply does not arise in this case. SCM and Kraftco do not come within any conceivable application of a *de minimis* rule, even if one were applicable here, since the competitive overlap between respondent and Kraftco was approximately $340 million in 1975. SCM's share of those sales, $83 million, is substantial by any measure.[18]

Respondent next argues that its constitutional rights to due process and equal protection of the laws have been violated by the Commission's departure from an established procedure generally taken with regard to Section 8. Respondent says that the Commission's prior practice has

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[16] 111 F. Supp. at 619.

[17] A strong argument can be made that there is no *de minimis* defense in a Section 8 case because the statute prohibits interlocks where the competitive relationship is such that elimination of competition by agreement would violate *any* of the provisions of *any* of the antitrust laws. Such an agreement would include price-fixing which is illegal regardless of the amount involved. Kramer, *Interlocking Directorships and the Clayton Act After 35 Years,* 59 Yale L.J. 1266 at 1269 (1950). But see *Paramount Pictures Corp.* v. *Baldwin-Montrose Chemical Co.,* 1966 Trade Cases, ¶ 71,678 (S.D. N.Y. 1966) which speaks of "*de minimis* competition" in the context of a Section 8 case where the competitive overlap was not only small, but also would not readily lend itself to a possible price-fix or a market allocation.

[18] As the court said in *Sears, Roebuck* "Surely, the sales of $80,000,000 do not come within the de minimis principle," 111 F. Supp. 614 at 621, and "The fact that this volume of sales may represent but a small percentage of either or both of the corporate defendants' annual sales, or a fraction of the annual retail sales of all distributors in the country of those commodities, does not militate against the undesirability of directorates common to both corporations." *Id.* at 620.

been to seek voluntary termination of interlocking directorates and then to dismiss the action after resignation of the challenged director. According to respondent, the Commission's failure to follow this procedure here is arbitrary and discriminatory. SCM Main Brief, pp. 23-34; SCM Reply Brief, pp. 8-9. This argument, too, is without merit.

The facts of the matter are that the Commission has used various methods in enforcing Section 8. It is true that between 1960 and 1966, the Commission closed eleven Section 8 investigations after termination of the offending interlocks, and that in none of the pre-1966 cases was a formal consent order executed.[19] But apparently this policy did not accomplish what Congress set out to do. As a result, in all formal complaint proceedings initiated since 1972, *corporate* respondents have routinely been required to enter into consent agreements even though the interlocks have been terminated.[20] Clearly, the Commission has the right, even the duty, to change procedures if it finds that informal settlements are not producing an adequate level of compliance. In any event, respondent's bald assertion that the Commission's practice is to dismiss actions after termination of the interlocks is in error since this has not been the Commission policy as revealed in the stipulated facts.

As for respondent's argument that SCM was discriminated against because it received "no notice whatsoever of the Commission's intention to file a complaint prior to

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[19] Exhibit "A" to Stip. One formal complaint issued during this period, *Dierks Forests*, 58 F.T.C. 304 (1961). The complaint was dismissed after the interlocking director resigned.

[20] Between 1972 and 1975, the Commission issued 19 formal complaints charging corporations with violation of Section 8. Each of these cases resulted in a consent settlement directed at *corporate* responsibility for compliance with Section 8. (Exhibit "A" to Stip.)

issuance thereof" (SCM Main Brief, p. 27), there has never been a requirement in the Commission's rules that any such advance notice be given.[21] But, as it happens, SCM did receive notice of the Commission's interest in a possible illegal interlock prior to issuance of the complaint.[22] There is no indication, however, that this notice, which SCM now regards as so imperative, inspired any pre-complaint action on the part of respondent to rid itself of Mr. Bond, or to prevent reoccurrence of Section 8 violations.

Finally, respondent maintains that this action has been rendered moot by the "voluntary" resignation of Bond from the Board of Directors of SCM after the complaint was issued. Although respondent itself recognizes that the mere discontinuance of an illegal act, particularly discontinuance after an investigation or formal action has begun, does not render a case moot, SCM contends that the surrounding facts demonstrate that no relief is neces-

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[21] Prior to April 4, 1975, the Commission issued, but was not required to do so, "proposed complaints" under Part 2 of its rules for the purpose of encouraging consent settlements before a formal complaint was issued. After April 4, 1975, *all* complaints (including this one) were issued under Part 3. If a consent settlement is negotiated in the investigation stage, the complaint and consent settlement may be issued simultaneously. See 40 Fed. Reg., No. 60, p. 15235 (April 4, 1975). Respondent seems to be suggesting that under the new rules, which abolished Part 2, it has been treated differently than other Section 8 respondents because it has not been given an opportunity to have its complaint and consent order entered simultaneously. SCM Main Brief, pp. 27-28. In the first place, and contrary to respondent's representation, in *Kane-Miller*, Dkt. 9034, the Part 3 complaint alleging a Section 8 violation (issued on June 17, 1975 and *not* on July 17, 1975 as respondent asserts) was not accompanied by consent settlements. The matter was withdrawn from adjudication on December 19, 1975 for the purpose of considering consent agreements signed in October and November, 1975. Secondly, respondent's argument on this point is obscure, to say the least, since there is no indication that it wished to enter into a consent settlement at any stage of this proceeding.

[22] On March 7, 1975. (Sexton Aff. 1, ¶ 8)

sary and the action must be dismissed as moot. SCM Main Brief, pp. 6-16.

On the general question of mootness (and in the very context of a Section 8 case) the Supreme Court said in *United States* v. *W. T. Grant,* 345 U.S. 629 (1953), that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.,* does not make the case moot." *Id.* at 632. The Supreme Court added, however, that an action can be moot if the defendant can demonstrate "there is no reasonable expectation that the wrong will be repeated," but the burden of doing so "is a heavy one." *Id.* at 633.

In the instant case, the points cited by SCM to meet this "heavy" burden are: (1) Bond's immediate "voluntary" resignation and his assurance that he does not intend to serve on respondent's Board while a director of Kraftco; (2) respondent's assurance (by affidavit) that Bond will not be re-elected to SCM's Board while he is a director of Kraftco or any other competitor of respondent; and (3) the lack of evidence of prior Section 8 or related violations by SCM. W. T. Grant establishes, however, that such grounds are insufficient to meet respondent's "heavy" burden in making a mootness defense. In that case, too, the defendant showed that the offending interlock no longer existed and it disclaimed any intention to revive the relationship. But the Supreme Court said that, "such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." *Id.* at 633.

Despite the clear holding in *W. T. Grant* that a mootness defense ordinarily will not arise from the mere fact that the director has resigned and the respondent says it will not re-elect the offending director, SCM seeks refuge in

the Supreme Court's refusal in that case to interfere with the District Court's denial of injunctive relief. In reviewing the discretionary power of the District Court with respect to injunctive relief, the Supreme Court said in *W. T. Grant* that it found no abuse of discretion on the facts of that case. But the Supreme Court indicated that the standard for injunctive relief—"some cognizable danger of recurrent violation, something more than a mere possibility. . . ." (*Id.* at 633) remains nevertheless, a matter of discretion with the trier of the facts. Thus in subsequent cases the Court has said "[whether] further violations [are] sufficiently remote to make injunctive relief unnecessary . . . is a matter for the trial judge." *United States* v. *Phosphate Export Assn.*, 393 U.S. 199, 203-204 (1968).[23]

The determination of how the trier of the facts—the Administrative Law Judge, in the first instance, and later the Commission upon review of the record—should exercise this discretion is not materially advanced by respondent's mere repetition (in various versions) of the refrain "there is no cognizable danger of recurrent violation" (SCM Main Brief, pp. 7, 9, 10, 11, 15, 16; SCM Reply Brief, pp. 2, 3, 4, 10, 13; Sexton Aff. 2, § 8): such self-serving declarations are entitled to no weight, especially when SCM is silent on what steps it has taken to avoid the danger of other unlawful interlocks.[24] In any event, if respondent's assessment of the danger of recurrence of a

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[23] See also *Treves* v. *Servel, Inc.*, 244 F. Supp. 773 at 777 (S.D. N.Y. 1965) where the court relying on *W. T. Grant* said "Beyond the mootness area lies the more difficult issue whether, as a matter of discretion, the court ought to dismiss plaintiff's request for injunctive relief."

[24] This is not to say that a mere voluntary undertaking by respondent to comply with the law would be an adequate safeguard for the future. *Clinton Watch Co.* v. *FTC*, 291 F.2d 838, 841 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962).

violation were the test, then, presumably, the Commission could never issue a cease and desist order in any case. See *Hershey Chocolate Corp.* v. *FTC*, 121 F.2d 968, 971 (3d Cir. 1941).

By the same token, respondent does not demonstrate the absence of a danger of recurrence by asserting that it may be caught again if it violates the law. SCM seems to be suggesting that because its selection of directors is a matter of public information and must be reported to the SEC and the New York Stock Exchange that this somehow guarantees against recurrence of the violation. SCM Main Brief, pp. 9, 15-16. The cogency of this argument is somewhat less than compelling since neither these reporting requirements nor public disclosure of Bond's membership on SCM's Board (presumably to SCM's stockholders) prevented the very violation which is the subject of this complaint. Moreover, respondent's position on this point seems to assume it is the function of the public, or its stockholders, or the New York Stock Exchange, or the SEC, or the FTC to protect SCM from violating the law. To the contrary, the obligation to comply with Section 8 falls squarely on every corporation which meets the statutory requirements.

It is also apparent that neither *W. T. Grant* nor any other decision relating to the discretionary power of the trier of facts to issue a cease and desist order can be read as meaning that no substantive violation can be found and no order can be issued unless complaint counsel comes forward with proof that respondent is a corporate recidivist.[25] Such a cavalier approach to Section 8, allowing

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[25] As the Supreme Court said in *W. T. Grant*, "The purpose of an injunction is to prevent future violations . . . and, of course, it can be utilized even without a showing of past wrongs." 345 U.S. 629 at 633.

one or more excused violations, would mean that in administering the antitrust laws one has to assume, contrary to fact, that Congress intended a high level of permissiveness.

As for the language in *W. T. Grant* that the moving party must persuade the trier of the facts of the need for injunctive relief, this does not mean that once a violation is proven, complaint counsel must then undertake a protracted second trial relating to the remedy. It is significant that on the limited facts before it in *W. T. Grant*—the failure of the director to terminate the interlocks despite five years of fruitless negotiation with the Government, the refusal by the director to concede illegality, and his failure to promise not to commit similar violations in the future—the Supreme Court said "Were we sitting as a trial court, this showing might be persuasive." *Id.* at 634. That the Supreme Court did not overturn a contrary conclusion by the lower court—that is, that the District Court was *not* persuaded—represents no more than the usual deference, in the absence of a clear showing of abuse, which the appellate body (*W. T. Grant* was a direct appeal to the Supreme Court) gives to the discretionary injunctive rulings of the trial court. See *Brown* v. *Chote,* 411 U.S. 452, 457 (1973).

From the lower court opinion, it is not possible to tell what would have persuaded the District Court in *W. T. Grant* that an order was indeed required, or how as a practical matter, the Government can hope to show any more than it actually did. Proof on the subject of the likelihood of future violations is bound to be elusive at best since we are dealing with slippery issues of predictability of conduct and how assiduously a company will comply with the law when it is not compelled to do so by an order. To

read *W. T. Grant,* however, as imposing a substantial burden in this respect would effectively frustrate enforcement of Section 8 which was specifically designed by Congress to avoid complex litigation. See *Protectoseal* v. *Barancik,* 485 F.2d 585, 589 (7th Cir. 1973). It would also be contrary to the clear holding of the Supreme Court that "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States* v. *du Pont & Co.,* 366 U.S. 316, 334 (1961).

I believe *W. T. Grant* is properly read as leaving undisturbed what the Supreme Court has consistently said about the broad discretion which the Commission has to determine whether a cease and desist order is needed in order to make certain that an unfair method of competition or illegal trade practice is stopped and not resumed. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608 (1946); *FTC* v. *Mandel Bros.,* 359 U.S. 385, 392 (1959). The Commission has traditionally exercised this discretion in favor of issuing orders enjoining future violations even where it is certain that the precise acts involved in a case could not be repeated because of statutory revisions or abandonment of the business. See discussion and cases cited in *Rubbermaid Inc.,* Dkt. 8939, 3 CCH Trade Reg. Rep. ¶ 21,131 at pp. 20,985-20,987 (April 13, 1976).

In this case there are no extenuating circumstances or other persuasive reasons for departing from overwhelming Commission precedent in favor of a cease and desist order. Here, as far as one can tell, nothing has been discontinued by SCM (Bond resigned of his own accord when he, too, was named as a respondent) and there is no basis for assuming that meaningful changes in procedures will be made unless respondent is ordered to do so. SCM has insisted

all along that as a corporation it is not subject to the prohibitions of Section 8, and it has not even given adequate assurances of voluntary compliance with the law in the selection of directors other than Bond. Surely, whatever SCM did to comply with the law prior to complaint (assuming it did anything) was inadequate since it did not detect or prevent an unlawful interlock with its competitor Kraftco. In sum, I fail to see how the public interest is protected in any way unless SCM is compelled to take positive steps to prevent future recurrence of the same practice.

As for the scope of the order, this is not a case where the remedy proposed by complaint counsel is only loosely connected to the illegal conduct and could only be justified under the "fencing in" rubric of *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957). The order which follows covers the *exact* same illegal practice as that charged in the complaint, and merely imposes a monitoring procedure which requires SCM to take certain minimal precautions in selecting directors to avoid interlocks. This is relief which is reasonably related to the unlawful practice which has been alleged and proven. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946).

## IV

## CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding, and over respondent SCM.

2. Respondent SCM was at all times material herein engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

3. Respondent SCM Corporation has violated Section 8

of the Clayton Act, 15 U.S.C. § 19, and Section 5[26] of the Federal Trade Commission Act, 15 U.S.C. § 45, by reason of the following:

(a) Respondent SCM and Kraftco are corporations which each have capital, surplus, and undivided profits aggregating more than $1,000,000.

(b) Respondent SCM and Kraftco are competitors in the sale of margarine, edible oils, and barbecue sauce.

(c) The elimination of competition with respect to the products cited in (b), above, by agreement between SCM and Kraftco would constitute a violation of the provisions of the antitrust laws.

(d) Richard C. Bond served on the Board of Directors of respondent SCM and Kraftco between 1967 and August 1, 1975.

4. This proceeding is not moot, and an order to cease and desist against SCM is both appropriate and necessary for the protection of the public interest.

Accordingly, the following order will issue:

## ORDER

1. It Is Ordered that upon this order becoming final Respondent SCM Corporation and its successors and as-

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[26] The complaint alleges a violation of both Section 8 and Section 5 of the Federal Trade Commission Act. I need not decide whether the substantive standard for judging an interlock may be different under Section 5 or whether Section 5 may reach an interlock which violates the policy of the Clayton Act although technically not within the four corners of Section 8. All the requirements of Section 8 have been met in this case, and my conclusion that Section 5 has been violated rests solely on the rule that the Federal Trade Commission Act registers all violations of the Clayton and Sherman Acts. *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-5 (1953).

signs, shall forthwith cease and desist from having, and in the future shall not have, on their board of directors any individual who either:

(a) serves at the same time as a director of Kraftco Corporation, its successors or assigns, or any other corporation which competes with SCM Corporation in the production or sale of any product or service; or

(b) fails to submit to SCM Corporation any statement required by Paragraph Two of this order.

2. It Is Further Ordered that within thirty (30) days of the date of service of this order and prior to each election of directors or to the solicitation of proxies for such election, whichever is earlier, hereafter, SCM Corporation shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a description of each product or service produced or sold by, each corporation which the director or nominee then serves as a director of, or at the time of the statement, has been nominated to serve.

Nothing in this Paragraph shall be construed to relieve Respondent of its obligation under Paragraph 1(a) hereof due to any error or omission contained in any written statement received pursuant to this Paragraph.

3. It Is Further Ordered that within forty-five (45) days of the date of service of this order and annually for a period of ten (10) years thereafter, SCM Corporation shall file with the Commission a written report setting forth in

detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph Two of this Order shall be submitted to the Commission as part of the reports of compliance required by this Paragraph. Nothing in this Paragraph shall relieve SCM Corporation of its obligation to comply with Paragraphs One, Two, and Four of this order once it is no longer required to submit reports of compliance to the Commission.

4. It Is Further Ordered that SCM Corporation shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Morton Needelman
Administrative Law Judge

June 17, 1976

## Decision and Order Adopting Agreement Based on Consent Order as to Kraftco Corporation

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9035

Commissioners:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
David A. Clanton

In the Matter of
KRAFTCO CORPORATION, a corporation.

The Federal Trade Commission having heretofore issued its complaint charging the respondent named in the caption hereto with violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act, and the respondent having been served with a copy of the complaint and with a copy of the notice of contemplated relief accompanying said complaint; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint heretofore issued, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

*Decision and Order Adopting Agreement Based on Consent Order as to Kraftco Corporation*

The Commission having thereafter issued an order withdrawing the matter described in the caption hereto from adjudication for the purpose of considering the proposed consent agreement pursuant to Section 3.25 of its Rules; and

The Commission, having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, and no comments having been filed, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Kraftco Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office located at Kraftco Court, Glenview, Illinois.
2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

I

It Is Ordered That Kraftco Corporation (identified in the complaint as "Kraftco, Inc."), a Delaware corporation, its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its Board of Directors if such individual is or would be at the same time a director of SCM Corporation, so long as Kraftco and

SCM Corporation compete in the production and sale of any product.

II

It Is Further Ordered that within ninety (90) days of the date of service of this order and annually in each of the four (4) years thereafter, Kraftco shall transmit to each member of its Board of Directors (except directors whose terms expire at the next election and who are not standing for re-election), and each nominee for directorship who is not then a director, a list of the following products: (a) cheese, (b) fluid milk, (c) ice cream, (d) barbecue sauce, (e) edible oils, (f) margarine, and (g) any product in which Kraftco had sales which accounted for 5% or more of Kraftco's gross revenues in the preceding fiscal year. "Product" as used in category (g) of this Paragraph shall mean the four-digit industry code (SIC) classifications published by the Bureau of the Census in its latest *Numerical List of Manfactured Products.* Kraftco shall also request that each director or nominee certify to Kraftco in writing that he or she does not serve on the Board of Directors of any corporation which is engaged in competition with Kraftco in the manufacture or sale in the United States of any product listed by Kraftco where the sales of such product by the corporation (exclusive of sales at retail to consumers) exceed $1,000,000 per year. The provisions of this Paragraph shall not apply where: (i) the other corporation on whose Board of Directors such nominee or director also serves controls 50 percent or more of the voting stock of Kraftco ("parent"); (ii) Kraftco controls, directly or indirectly through subsidiaries, 50 percent or more of the voting stock of the other corporation on whose Board of Directors such nominee or director also serves ("subsidiary"); or (iii) 50 percent

or more of the voting stock of the other corporation on whose Board of Directors such nominee or director also serves is held by a corporation which also holds 50 percent or more of the voting stock of Kraftco ("sister"). "Corporation" as used herein shall include parent, subsidiary or sister corporations.

III

IT IS FURTHER ORDERED that for a period ending five (5) years from the date of service upon it of this order, Kraftco shall not permit on its Board of Directors any nominee or director who fails to submit a written certification pursuant to Paragraph II above, either because he or she cannot truthfully submit such written certification or for whatever other reason, or with respect to whom a reasonably diligent investigation by Kraftco would reveal that such certification cannot truthfully be made. The prohibition contained in this Paragraph shall not apply where (a) Kraftco, or any corporation on the Board of Directors of which a nominee or director of Kraftco also serves, cease to be competitors; or (b) said nominee or director ceases to serve on the Board of Directors of such other competitor corporation. Notwithstanding any other provision of this order, any director or nominee shall not be prohibited by this order from serving on the Board of Directors of Kraftco, if Kraftco has shown to the satisfaction of the Federal Trade Commission or to any other court of competent jurisdiction, in a final non-appealable determination, that there is no competition as defined in Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act between Kraftco and the other corporation on whose Board he or she serves in the manufacture or sale of any product required to be listed by Kraftco pursuant to Paragraph II of this order.

*Decision and Order Adopting Agreement Based on Consent Order as to Kraftco Corporation*

IV

IT IS FURTHER ORDERED that within ninety (90) days of the service of this order, and annually for each of the four years thereafter, Kraftco shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. If compliance with this order requires any member of Kraftco's Board of Directors to resign or to be removed from the Board of Directors of Kraftco, or of another corporation, Kraftco shall be allowed a reasonable period of time, but in no event longer than ninety (90) days, within which to take any legal or other steps which are necessary to secure compliance with this order. Nothing in this order shall be construed to exempt Kraftco from complying with the antitrust laws or the Federal Trade Commission Act and the fact that any activity is not prohibited by this order shall not bar a challenge to it under such laws.

V

IT IS FURTHER ORDERED that Kraftco notify the Commission at least thirty (30) days prior to any change in Kraftco, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in Kraftco which may affect compliance obligations arising out of this order.

By the Commission. Commissioner Dole did not participate by reason of absence.

Charles A. Tobin,
Secretary

S E A L

Issued: September 9, 1976

## Opinion and Final Order of the Commission— January 11, 1977

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 9035

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
David A. Clanton

In the Matter of
KRAFTCO CORPORATION, a corporation,
SCM CORPORATION, a corporation,
and
RICHARD C. BOND, an individual.

### FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion having determined to deny the appeal:

IT IS ORDERED that the initial decision of the administrative law judge, pages 1-18, be adopted as the Findings of Fact and Conclusions of Law of the Commission.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to Cease and Desist be, and it hereby is, entered:

## ORDER

The following definitions shall apply in this order:

"Subsidiary" of SCM means any corporation, 50 percent or more of the voting stock of which is owned or controlled, directly or indirectly, by SCM.

"Parent" of SCM means any corporation which owns or controls, directly or indirectly, 50 percent or more of the voting stock of SCM.

"Sister" of SCM means any subsidiary of a parent of SCM.

1. IT IS ORDERED that respondent SCM Corporation and its successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their board of directors any individual who either:

(a) serves at the same time as a director of Kraftco Corporation, its successors or assigns (so long as Kraftco and SCM Corporation compete in the production or sale of any product or service), or serves at the same time as a director of any other corporation (other than a subsidiary, parent, or sister of SCM) which competes with SCM Corporation in the production or sale of any product or service; or

(b) fails to submit to SCM Corporation any statement required by Paragraph Two of this order to be obtained by SCM.

2. IT IS FURTHER ORDERED that within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, SCM Corporation shall

obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service produced or sold by, each corporation which the director or nominee then serves as a director, or has been nominated to serve as a director at the time of the statement.

The requirements of this Paragraph shall not apply to elections of directors occurring after five years from the effective date of this order, nor shall directors or nominees be required to list products or services of subsidiaries, sisters, or parents of SCM Corporation.

Nothing in this Paragraph shall be construed to relieve respondent of its obligation under Paragraph 1(a) hereto due to any error or omission contained in any written statement received pursuant to this Paragraph.

3. It Is Further Ordered that within forty-five (45) days of the effective date of this order and annually for a period of ten (10) years thereafter, SCM Corporation shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph Two of this order shall be submitted to the Commission as part of the reports of compliance required by this Paragraph during the first five (5) years. Nothing in this Paragraph shall relieve SCM

Corporation of its obligation to comply with Paragraphs One and Four of this order once it is no longer required to submit reports of compliance to the Commission.

4. It Is Further Ordered that SCM Corporation shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

By direction of the Commission.

John F. Dugan
Acting Secretary

SEAL

Attachment:
Concurring Statement by
Chairman Collier

Issued: January 11, 1977

## CONCURRING STATEMENT BY CHAIRMAN COLLIER

I concur in the Commission's Opinion, Findings of Fact, Conclusions of Law, and Order, except that I find it unnecessary to reach the question whether the director interlock in question violated Section 5 of the Federal Trade Commission Act. I conclude that a violation of Section 8 of the Clayton Act has been proven here, and that the order entered by the Commission is fully supported by that conclusion.

*Opinion and Final Order of the Commission—*
*January 11, 1977*

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 9035

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
David A. Clanton

In the Matter of
KRAFTCO CORPORATION, a corporation,
SCM CORPORATION, a corporation,
and
RICHARD C. BOND, an individual.

## OPINION OF THE COMMISSION

By Dixon, Commissioner:

Complaint in this matter was issued on June 17, 1975, charging Krafteo Corporation ("Krafteo"), SCM Corporation ("SCM") and an individual, Richard C. Bond ("Bond") with violating Section 8 of the Clayton Act (15 U.S.C. § 19) and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) by virtue of Bond's simultaneous presence on the boards of directors of the two corporations.

The case was assigned for hearing to Administrative Law Judge ("ALJ") Morton Needelman. Subsequently the matter was withdrawn from adjudication with respect to

Bond and Kraftco, consent agreements with these parties were signed, and consent orders against them were issued on April 26 and May 6, 1976, respectively. The case against SCM was tried pursuant to a stipulated record, and Judge Needelman entered an initial decision sustaining the complaint and recommended entry of an order to cease and desist. The case is before us on respondent SCM's appeal from the ALJ's decision.

*Initial Decision*

It was not disputed, and Judge Needelman so found, that Bond served simultaneously on the Boards of Directors of SCM and Kraftco, that both corporations are engaged in commerce and have capital, surplus, and undivided profits aggregating more than $1,000,000, and that the two corporations competed with each other in the sale of margarine, edible oils, and barbecue sauce. (I.D. 3-8) [1] Sales by SCM in fiscal 1975 of products sold in competition with Kraftco were roughly $83 million, while Kraftco's sales in the same category approximated $258 million. (I.D. 7)

The ALJ concluded that respondent had violated Section 8 of the Clayton Act and Section 5 of the FTC Act. The Judge further concluded that the need for an order to cease and desist was not rendered moot by Bond's voluntary resignation from SCM's Board or by any other circumstances, and that entry of an order corresponding to the "Notice of Contemplated Relief" initially served with the complaint was necessary to prevent recurrence of Section 8 violations and protect the public interest.

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[1] The following abbreviations are used throughout this opinion:
I.D. —Initial Decision, Finding No.
I.D. p.—Initial Decision, Page No.

*Opinion and Final Order of the Commission—*
*January 11, 1977*

On appeal respondent argues that it has committed no violation of law; that if it has committed a violation there is nonetheless no necessity for the imposition of a remedial order; and that if there is a need for the imposition of a remedial order it should be no different from the consent order negotiated by co-respondent Kraftco.

*Liability of Corporate Respondent*
*(a) Clayton Act, Section 8*

Respondent does not question that a violation of Section 8 has occurred, but it contends that only an individual director may be held liable for such a violation.

Respondent places its principal reliance upon the language of the Section which states in relevant part that:

> ". . . no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination, or competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws."

Respondent contends that Section 8, by its terms, merely forbids *individuals* to be joint directors; it does not render *corporations* liable to suit for the use of interlocking directorates.[2]

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[2] Our own review of the legislative history reveals no sign that this question was directly addressed during the course of Congres-

*(footnote continued on following page)*

While the language of Section 8 read *in vacuo* perhaps leaves some doubt as to the entities its proscription is intended to cover, the language of Section 11, [15 U.S.C. § 21] which provides for enforcement of Section 8, leaves none. In relevant part Section 11 provides that the Commission shall, upon a finding that any "person" (defined in 15 U.S.C. § 12 to include corporations) has violated Section 8,

> ". . . issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or *rid itself of*

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*(footnote continued from preceding page)*

sional debate over the Clayton Act. Respondent cites a statement of Rep. Nelson, at p. 21 of its brief, which it argues implies that he understood Section 8 to cover only individuals. Whether this is a valid or relevant inference, the opposite inference can plausibly be drawn from other comments in the Congressional debates, like Representative Nelson's not directed to the precise issue here, which seem to treat Section 8 as though it imposed obligations on corporations. For example:

> "In drafting the provisions of Section 9 [now Section 8] your committee has endeavored to carry out the recommendations of the President. In order that the corporations affected may have ample time to readjust their boards of directors in keeping with the requirements of the act [a two year grace period is allowed] . . ." H.R. No. 627, H.R. 15656, p. 18, Part 1, 63 Cong., 2d Session (1914).
>
> "This section will be full of difficulty and peril for small corporations, and will affect them in far greater degree than it will large ones, against which the legislation is presumed to be aimed.
>
> "The use of interlocking directorates serves many useful purposes, and because in some instances it has been used to foster monopoly or create a restraint of trade, does not furnish a good reason why the use of interlocking directorates generally should be forbidden." *Ibid.*, Part 2, p. 8.

On balance we think comments such as these, or those allegedly to the opposite effect cited by respondent, shed little light on the question here in issue.

> *the directors chosen contrary to the provisions of sections 7 and 8 of this Act,* if any there be, in the manner and within the time fixed by said order. . . ." [emphasis added]

Needless to say, only a corporation may "rid itself" of directors. SCM suggests that the underlined words are a vestigial remnant intended only to cover banks and the Federal Reserve Board, but there is nothing in the wording of the statute or in its legislative history to support this distinction. (I.D. p. 7) Rather, Section 11 by its plain terms empowers the Commission to remedy violations of Section 8 by entering an order to cease and desist against *corporations,* and this Section would be robbed of meaning by a construction that excluded corporations from the entities covered by Section 8. We believe, instead, that when Section 8 forbids the presence of a director on the boards of competing corporations, it speaks both to the director and to the competing corporations, and all may be held accountable for ignoring its dictates.

Respondent correctly points out that the Supreme Court reserved judgment on this issue in a case in which it arose, *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 634n.9 (1953). However, at least one lower court has enjoined a corporation from Section 8 violations in a case brought to enforce that Section, *United States* v. *Sears, Roebuck and Co.,* 111 F. Supp. 614 (S.D.N.Y. 1953), *decree construed,* 165 F. Supp. 356 (S.D.N.Y. 1958), a second court has recently asserted the same authority [3], and the imposi-

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[3] *United States* v. *Crocker National Corp.,* No. C-75-2108, *United States* v. *BankAmerica Corp.,* No. C-75-2109 (N.D. Cal., 8/27/76), [1976] 5 Trade Reg. Rep. (1976-2 CCH Trade Cases) ¶ 61,044.

*(footnote continued on following page)*

tion of corporate liability is in accord with decades of Justice Department and Federal Trade Commission enforcement of the Clayton Act, via voluntary action, consent agreements, and litigation. To absolve corporations of liability for sharing directors with competitors would, without question, severely undermine enforcement of the law, since any corporation could maintain such an interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member, again without fear that detection could lead to anything more than the director's resignation. Sanctions against individuals alone are likely to be of limited effect, because there are hundreds of thousands of potential corporate directors at any given time. Sanctions against a much smaller number of corporations are far likelier to effectuate the purposes of Section 8, since an order against a corporation will prevent a far larger number of potential interlocks than one against an individual.

For the foregoing reasons we conclude that respondent's conduct violates the Clayton Act and may be proscribed by this Commission. We do not quarrel with respondent's

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*(footnote continued from preceding page)*

After noting that the corporate defendants in these interlock cases had argued that Section 8 applied only to individuals, Judge Peckham observed that:

> "[r]egardless of whether this contention is correct, it is clear, and the defendants conceded at oral argument, that were this court to decide that injunctive relief were appropriate in these cases, this court could, if it chose to, enjoin the defendant corporations, as well as the individual defendants from further violating Section 8. *See e.g.*, 15 U.S.C. § 25." (p. 69,673, footnotes omitted)

15 U.S.C. § 25 is Section 15 of the Clayton Act (the Justice Department/Federal Court analog to Section 11), which empowers the district courts to "prevent and restrain violations of this Act."

proposition that the "plain meaning" of a statute may not be disregarded in order to effect its purpose. All that is "plain" in this instance, however, is that the Clayton Act authorizes the Commission to enter an order to remedy what respondent has done. Read in this light, we think Section 8 is properly construed to prohibit corporations as well as individuals from effecting interlocking directorates. The fact that this interpretation is most likely to effectuate the Congressional purpose is only a further reason to favor it.

*(b) Federal Trade Commission Act, Section 5*

We also conclude that respondent's conduct runs afoul of Section 5 of the Federal Trade Commission Act, which prohibits, *inter alia,* unfair methods of competition. It is well established that the prohibitions of Section 5 extend to practices which offend the underlying spirit and policy, as well as the letter, of the antitrust laws, *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 239-244 (1972); *FTC* v. *Brown Shoe,* 384 U.S. 316 (1966); *FTC* v. *Motion Picture Advertising Service Co.,* 344 U.S. 392 (1953). Assuming *arguendo* that illegally interlocked corporations must be allowed to escape liability through the allegedly porous wording of Section 8, no better illustration of a practice offensive to the spirit and policy of the antitrust laws if not their letter can be imagined than the employment and retention by a corporation of a director whose presence on the board itself violates the law. Application of Section 5 in such a case does no more than effectuate the clear purpose of the Clayton Act.

Section 5 has been similarly applied in an earlier case also arising under the Clayton Act. In *Grand Union Co.* v. *FTC,* 300 F. 2d 92 (2d Cir. 1962), the court sustained the

Commission's conclusion that Grand Union in its role as a buyer had violated Section 5 by knowingly soliciting and receiving payments made by suppliers in violation of Section 2(d), 15 U.S.C. § 13(d). The court so found despite the fact that Section 2(d) did not expressly mention buyers. In rejecting the argument that the Commission had applied Section 5 to effect an unwarranted expansion of the Clayton Act the Court reasoned:

> "Nor can we accept the notion that the Commission is here legislating a 'new antitrust prohibition.' The practice itself is clearly proscribed . . . The Commission is not upsetting specific Congressional policies; the proceedings did not 'circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act.' No economic activity, once lawful, has been suddenly brought within the prohibition of the antitrust laws. Jurisdiction, perhaps, has been expanded from . . . technical confines . . . but only fully to realize the basic policy of the . . . Act. . . ." 300 F.2d at 98 (footnotes omitted).

Here, as well, the application of Section 5 does no more than permit the effectuation of a Congressional policy by applying that policy to the entities in the best position to ensure its success.

That Congress specifically contemplated the application of Section 5 to interlocking directorates is, moreover, suggested by some of the legislative history cited by complaint counsel. In explaining the language of Section 5, for example, the Senate Interstate Commerce Committee reported that:

> "The Committee was of the opinion that it would be better to put in a general provision condemning

> unfair competition than to attempt to define the numerous *unfair practices, such as* local price cutting, *interlocking directorates,* and holding companies intended to restrain substantial competition." [emphasis added] [4]

For these reasons, then, we conclude that respondent's conduct runs afoul of Section 5 of the Federal Trade Commission Act.

*Necessity for an Order*

Respondent argues that even assuming it has been found to have violated the law, it should nevertheless not be ordered to desist from future violations, since it has halted the prior infraction and promises never to repeat it.[5] The administrative law judge rejected this argument and we fully concur in his conclusion and in his reasoning, at I.D. pp. 12-16.

The violation which occurred here continued for several years and was terminated only when pointed out by the Commission. It was, moreover, not an insignificant, trivial, or technical infraction. In 1975, SCM and Kraftco competed with respect to more than $300 million worth of business, of which more than $80 million were sales by SCM. While these figures are only a small fraction of the total sales of the companies, $300 million or $80 million is by any measure a great deal of trade to be jeopardized by

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[4] S. Rep. No. 597, 63rd Congress, 2d Sess. 13 (1914) *See also* the remarks of Senator Newlands, Chairman of the Committee, on the floor, 51 Cong. Rec. 11106, 11537, 12980 (1914).

[5] SCM promises never to rehire Bond so long as he directs Kraftco or any other corporation competing with SCM (Appeal Brief, p. 16). It does not promise to avoid other unlawful interlocks with Kraftco or anyone else.

the sorts of anticompetitive agreements which interlocking directorates facilitate, and which Congress meant to stop before they got started when it imposed its ban on interlocks between competitors, cf. *Sears, Roebuck, supra.* 111 F. Supp. 614 at 621. If one regards the antitrust laws seriously, and we do, this was a serious violation.

It may be that respondent does not intend to utilize illegally interlocked directorates in the future. But it probably did not intend to use them when it hired Mr. Bond either. We cannot, however, resist the conclusion that SCM paid inadequate attention to whether it acted permissibly or not, and there is nothing whatsoever in the record to suggest it will not continue to pay insufficient attention in retaining future directors unless ordered to do so.[6]

Under these circumstances we find nothing to challenge the ALJ's conclusion that an order is appropriate here. The *W. T. Grant* case, *supra,* cited by respondent held no more than that it was within the discretion of a trial court judge to withhold injunctive relief where a violation had been halted. The Court strongly suggested that it would not have quarreled with the imposition of injunctive relief in the same case, and obviously did not intend to disturb a long line of cases, prior and subsequent, holding that dis-

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[6] SCM argues there is nothing which requires it to announce what steps it will take or has taken to avoid interlocks. (Appeal Brief, p. 18). We completely agree, and if those undisclosed procedures it uses to comply with the law had proven adequate to prevent this violation their identity would be no concern of ours. However, since a violation involving a large amount of commerce did occur and persist for several years, and since the record discloses nothing of the procedures used by respondent to prevent such occurrences, we are hard pressed to see what other conclusion can be reached than that SCM's procedures are inadequate to ensure nonrepetition of future violations.

continuance of a violation is not proper grounds for omission of a Commission order, *e.g., Fedders Co.* v. *FTC,* 529 F.2d 1398 (2d Cir.), *cert. denied,* 45 U.S.L.W. 3244 (Oct. 5, 1976); *Coro Inc.* v. *FTC,* 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965); *Clinton Watch Co.* v. *FTC,* 291 F.2d 838, 841 (7th Cir. 1961), *cert. denied,* 368 U.S. 952 (1962); *Galter* v. *FTC,* 186 F.2d 810, 813 (7th Cir.), *cert. denied,* 342 U.S. 818 (1951); *Eugene Dietzgen* v. *FTC,* 142 F.2d 321, 330 (7th Cir.), *cert. denied,* 323 U.S. 730 (1944). *See also, United States* v. *Newmont Mining Corp.,* 34 F.R.D. 504, 505 (S.D.N.Y. 1964): "It is plain that mere resignation of a directorship allegedly held in violation of § 8 of the Clayton Act does not render an action for violation of that Section moot. The *Grant* case expressly so holds."

Respondent's position here would necessitate that having shown a violation, complaint counsel then demonstrate by affirmative evidence the likelihood of future additional violations. To the contrary, we think the violation is itself the best evidence of the possibility of future such occurrences, and the the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order, *United States* v. *W. T. Grant Co., supra* at 633.

## THE ORDER

The administrative law judge entered an order corresponding generally to the provisions of the "Notice of Contemplated Relief" served upon the parties at the time the complaint was issued. Basically this order forbids SCM to violate Section 8 in the future (Par. 1), and establishes a mechanism for implementing and monitoring such

compliance by requiring that future candidates for director provide a list of the products manufactured by companies which they already direct (Par. 2). Copies of these reports shall be filed with the Commission periodically, for a period of 10 years, and SCM may not hire a director who has not provided the required report.

SCM argues generally that its order should be no broader than that consented to by Kraftco and directs particular objection to Paragraph 2, contending that the requirement that prospective directors list all products manufactured by companies of which they are presently directors may prove unduly burdensome in cases of companies which manufacture numerous products.

Having reviewed the order recommended by the ALJ, we believe it is a generally appropriate disposition of this matter, narrowly tailored to prevent recurrence of the type of infraction that gave rise to this proceeding, *i.e.*, the use of an interlocking directorate violative of Section 8 of the Clayton Act and Section 5 of the FTC Act. We believe that Paragraph 2 is necessary, initially, to provide a ready means by which SCM may effect compliance by itself and its directors and prospective directors with Section 8, and also a means by which the Commission may check on SCM's compliance since it will review the product lists submitted by SCM directors. We have changed the necessity for "product description" to "product list" and as modified we do not believe this requirement should be unnecessarily burdensome. We believe that even large corporations have readily available a list or lists of the products they manufacture. However, we believe there is no necessity that this requirement exist in perpetuity, and we shall instead limit its duration to a period of five years. During this time it will provide a mechanism for SCM to comply with the law

and for the Commission to monitor its compliance. Thereafter, SCM will remain under obligation to adhere to Section 8, but it will be at liberty to adopt alternative methods by which to do so, as its experience dictates.

We have also modified Paragraph 1(a) to make clear that its prohibition on interlocks with Kraftco Corporation applies only while SCM and Kraftco are competitors. In addition we have modified the class of competitors with which SCM may not interlock to exclude any "subsidiaries", "sisters", or "parents" as defined in the order, and amended the reporting requirement accordingly. In all other respects we have retained the order recommended by the administrative law judge, and conclude that it is in the public interest that such an order be entered.

Respondent argues, as noted above, that if an order must be entered it should be no different, or at least no more stringent, than the consent order to which co-respondent Kraftco earlier agreed. Any more comprehensive order, protests respondent, would be discriminatory and tantamount to punishing it for having exercised its constitutional right to contest the charges against it.[7] SCM seeks to bolster its argument with the following syllogism: In accepting a

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[7] Respondent also makes certain other charges of discrimination which are patently frivolous. It cites the Commission's past practice of forebearing to obtain an order where the interlock was dissolved. But it does not deny that this enforcement strategy was modified well in advance of the instant matter, since which time the Commission has sought cease and desist orders from many alleged Section 8 violators (I.D. p. 11). Respondent also argues that it was discriminated against by being sued without being previously notified of the charges against it. Assuming *arguendo* that this was the case (there is some dispute as to whether it was, I.D. pp. 11-12) we can apprehend no prejudice since respondent was subsequently given an opportunity to negotiate a consent settlement but evinced no apparent interest (I.D. p. 12, n. 21).

consent order the Commission certifies that it is in the public interest; a litigated order must similarly be in the public interest; therefore the Kraftco consent order is a sufficient disposition of this proceeding and anything in excess of its provisions must amount to punishing SCM for litigating.

An unstated premise of this argument is, of course, that Kraftco, the consent settlor, may be assumed to have violated the law in equal measure as SCM, so that the remedy appropriate to Kraftco may somehow be the test of that appropriate to SCM. In fact, of course, Kraftco in settling admitted no legal liability, and gave up its opportunity to defend the charges against it and to present any evidence which might tend to mitigate the force of incriminating evidence. In light of this it is somewhat presumptuous for this Commission or SCM to assume that Kraftco's order provides an absolute measure of what would satisfy the public interest with respect to SCM.

However, assuming *arguendo* that it is at all relevant to compare the treatment of a party which has not admitted liability and that accorded a party adjudged in violation, we nonetheless find no impropriety in the mere imposition of varying orders upon settlors and non-settlors in the same case.

The "public interest" on behalf of which this Commission is enjoined to act comprehends not only the justness with which particular disputes are resolved, but the speed and efficiency with which resolutions are obtained as well. The public unquestionably has a strong interest in the ability of its law enforcement institutions to resolve controversies swiftly and at minimum cost. Every party accused of wrongdoing in our system has the right to insist that the government prove the charges against it, but if every

accused were to exercise that right to its fullest extent the administration of justice would be seriously retarded if not actually imperiled. As a result, we believe the Commission does not act improperly when, in considering acceptance of a proferred consent order, it weighs as part of the requisite public interest the savings in time, money, and uncertainty which the settlement will provide.

It follows from this that the terms of a consent settlement may, consistently with the public interest, be less stringent than the corresponding order obtained through litigation, and conversely, that an order entered after litigation may properly be more stringent than an order entered after settlement.

Moreover, SCM does not suggest, nor could it, that the order entered here will disadvantage it in competing with Kraftco, or with any other company. Nor does the order do more than prevent the recurrence of violations of law previously engaged in. This being the case, we cannot conclude that the order is punitive merely because it is broader in some respects than an order entered after negotiations with a party charged with but not formally adjudged to have committed the same offense.

An appropriate order is appended.

## Opinion of the Court of Appeals— 565 F.2d 807 (2d Cir. 1977)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 53, Docket 77-4078

SCM CORPORATION,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

Respondent.

Argued Sept. 26, 1977.
Decided Dec. 23, 1977.

William E. Willis, New York City (Sullivan & Cromwell, New York City, James E. Tyrrell, Jr., New York City, of counsel, Milton Wolson, New York City, on the brief), for petitioner.

David C. Shonka, Atty., F. T. C., Washington, D. C. (Michael N. Sohn, Gen. Counsel, Gerald P. Norton, Deputy General Counsel, Jerold D. Cummins, Acting Asst. Gen. Counsel, Washington, D. C., on the brief), for respondent.

Before MOORE, FEINBERG and MULLIGAN, Circuit Judges.

FEINBERG, Circuit Judge:

This petition by SCM Corporation to set aside an order of the Federal Trade Commission raises an issue of first impression in this court: Whether section 8 of the Clayton Act, regulating interlocking directorates, applies to corporations as well as to individual directors. We hold that it does, but because the FTC may have applied the wrong

legal standard in entering a cease and desist order against SCM, we remand for further proceedings.

## I

This proceeding grows out of the circumstance that from 1967 to 1975 Richard C. Bond was a member of the board of directors of both SCM and Kraftco Corporation, which competed with each other in certain markets. SCM is a diversified company which manufactures and distributes such products as business equipment, home appliances, paint, food and chemicals. Its sales in the fiscal year ended June 30, 1975 were $1,287,000,000. Kraftco is a leading processor and distributor of cheese and dairy products. Its total sales in the year ending December 31, 1974 were $4,500,000,000. Both corporations sell margarine, barbecue sauce and edible oils. In fiscal 1975, SCM sold approximately $83 million of these products in competition with Kraftco. In the same period, Kraftco's sales of the same products, in competition with SCM, were approximately $258 million. The capital, surplus and undivided profits of both corporations aggregate more than $1 million.

In June 1975, the FTC issued a complaint against Kraftco, SCM and Bond, alleging that Bond's presence on the board of directors of both corporations violated section 8 of the Clayton Act, 15 U.S.C. § 19.[1] Shortly after the complaint was issued, Bond resigned from the SCM board. Thereafter, he consented to the entry of a cease and desist order, as did Kraftco. SCM answered the complaint and moved for summary decision, arguing, among other things,

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[1] The complaint also charged violation of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).

that Bond's resignation from SCM had mooted the proceeding against it, that competition between SCM and Kraftco was insufficient to justify a section 8 proceeding, that the section does not apply to corporations, and that the FTC was enforcing the section in a discriminatory fashion. The FTC also moved for summary decision. The case was submitted to the Administrative Law Judge on a stipulated record. In June 1976, the ALJ filed an Initial Decision and Order against SCM, finding that section 8 had been violated and that a cease and desist order was justified. SCM appealed to the Commission, which in January 1977 issued a written opinion, affirming the decision of the ALJ.[2] SCM then filed this petition for review.

## II

In this court, SCM repeats many of the arguments made in the administrative proceedings below, and additionally contends that injunctive relief was both unwarranted and granted pursuant to an erroneous legal standard.[3] First, however, we turn our attention to the substantial issue concerning the scope of section 8, which provides in pertinent part:

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, . . . if such corporations are or shall have

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[2] *In re Kraftco Corp.*, 89 F.T.C. 46, 60 (1977). The Commission also found a violation of section 5(a)(1) of the Federal Trade Commission Act. See note 1 supra. In view of our disposition, we need not consider this aspect of the case.

[3] However, SCM does not claim here, as it did below, that the amount of competing sales was de minimis.

> been . . . competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

SCM maintains that the prohibition of this section applies only to individual directors and not to the corporations on whose boards the directors serve.

The question thus posed was noted, but not decided, by the Supreme Court in *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 634 n.9, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). Surprisingly, the issue has received scant attention in decisions of the lower federal courts. We are cited to only two district court cases in point. In *United States* v. *Sears, Roebuck & Co.*,[4] Judge Weinfeld held that the corporate defendants had violated section 8 by acquiescing in the interlocked directorship. Similarly, the court in *United States* v. *Crocker National Corp.*, 422 F.Supp. 686, 705-06 (N.D. Cal. 1976), appeal docketed, No. 76-3614 (9th Cir. Dec. 10, 1976), stated in dictum that the defendant corporations there would have been subject to injunction had they violated section 8. Perhaps the paucity of judicial writing on the point[5] is due to general acquiescence, despite the Supreme Court's express reservation of the issue, in what

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[4] 1952-53 Trade Cas. (CCH) ¶ 67,561 (S.D.N.Y. 1953), see also *United States* v. *Sears, Roebuck & Co.*, 165 F.Supp. 356 (S.D.N.Y. 1958) and 111 F.Supp. 614 (S.D.N.Y. 1953). See generally *United States* v. *Newmont Mining Corp.*, 34 F.R.D. 504 (S.D.N.Y. 1964).

[5] For law review discussion, see Wilson, Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act, 45 Antitrust L.J. 317, 321-23 (1976); Kramer, Interlocking Directorships and the Clayton Act After 35 Years, 59 Yale L.J. 1266, 1268 n.12 (1950). See generally Panel Discussion, Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act, 45 Antitrust L.J. 315-51 (1976).

the FTC characterized below as "decades of Justice Department and Federal Trade Commission enforcement of the Clayton Act, via voluntary action, consent agreements, and litigation."[6] In any event, we have been unable to find any resolution of this issue by any court of appeals.[7]

SCM contends that the language and legislative history of section 8 support its interpretation. SCM argues that only individuals can violate section 8 because it provides only that "[n]o *person* at the same time shall be a *director* . . .," (emphasis supplied) and not, for instance, that a corporation is prohibited from electing, or having, a director who is also on the board of a competitor. SCM further points out that section 8 as first enacted explicitly prohibited banking corporations, but not so-called industrial corporations, from having interlocking directors.[8] SCM also relies on committee reports to support its construction of the section as applying only to individuals.[9]

The FTC argues to us primarily that this restrictive reading of section 8 ignores the policies behind it. The

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[6] 89 F.T.C. at 62-63. See, e.g., *Chrysler Corp.*, 83 F.T.C. 1204 (1974). See also Travers, Interlocks in Corporate Management and the Antitrust Laws, 46 Tex.L.Rev. 819, 821-22 (1968) ("Moreover, the absence of litigation may indicate that the Department's campaign to secure voluntary compliance is notably successful."); but see Wilson, supra n.5, at 317-19 (enforcement of section 8 described as "long periods of benign neglect" "punctuated by a few bursts of mild activity").

[7] In *Protectoseal Co.* v. *Barancik*, 484 F.2d 585 (7th Cir. 1973), then Circuit Judge Stevens stated in dictum that "[t]he corporation itself is a potential defendant in litigation which the government may initiate to enforce § 8."

[8] Clayton Act, ch. 323, § 8, 38 Stat. 732-33 (1914). This language was subsequently eliminated. Pub.L.No. 305, 49 Stat. 718 (1935).

[9] E.g., H.R. Rep. No .627, Part I, 63d Cong., 2d Sess. 17-20 (1914).

point was well made in the FTC's opinion below:

> To absolve corporations of liability for sharing directors with competitors would, without question, severely undermine enforcement of the law, since any corporation could maintain such an interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member, again without fear that detection could lead to anything more than the director's resignation. Sanctions against individuals alone are likely to be of limited effect, because there are hundreds of thousands of potential corporate dierctors at any given time. Sanctions against a much smaller number of corporations are far likelier to effectuate the purposes of Section 8, since an order against a corporation will prevent a far larger number of potential interlocks than one against an individual.

89 F.T.C. at 63. The FTC also relies on section 11(b) of the Act, which provides that whenever the Commission finds that any person [10] has violated any section of the Act, the Commission

> *shall issue* and cause to be served on such person *an order* requiring such person to *cease and desist* from such violation, and . . . *rid itself* of the directors chosen contrary to the provisions of [section 8] . . .. (Emphasis supplied).[11]

Since only a corporation can rid itself of a director, the FTC argues that section 8 must apply to corporations as well as to individual directors. SCM rejoins that section 11 is exclusively procedural and cannot add substantive obliga-

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[10] "Person" includes corporations. 15 U.S.C. § 12.

[11] 15 U.S.C. § 21(b).

tions to section 8, and that the language stressed by the FTC is a vestigial remainder of the original section 8 provision that covered banking corporations.[12]

We believe that the Commission has the better of these arguments and that section 8 applies to corporations as well as to individual directors. It is true that if the language of the section is considered alone, the result is not clear.[13] But the language of the section does not stand alone and should not be construed as though it did. Its prophylactic purpose was "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates." *United States* v. *Sears, Roebuck & Co.*, 111 F.Supp. 614, 616 (S.D.N.Y. 1953). We agree with the Commission that SCM's reading of the statute undermines it, since a corporation without fear of sanction could have the concededly prohibited "interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member." Thus, policy supports a broad reading of section 8 and section 11 indicates that such a construction is reasonable. It is not at all clear that the language there relied on by the Commission is merely a meaningless vestige of an earlier version of the statute.

The sparse legislative history appears to support the FTC's position. The House Report accompanying the bill talks about "the corporations affected" and states that "[t]his section is divided into three paragraphs each of which relates to the *particular class of corporations de-*

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[12] See note 8 *supra*.

[13] The Commission noted, in its opinion below: "The language of Section 8 read *in vacuo* perhaps leaves some doubt as to the entities its proscription is intended to cover. . . ." 89 F.T.C. at 61-62.

*scribed,* and the provisions of *each* paragraph are limited in their application to the *corporations* belonging to the class named therein." (Emphasis supplied). H.R.Rep. No. 627, 63d Cong., 2d Sess. 18 (1914). The paragraph involved in this case was apparently thought of as controlling interlocks among the "industrial corporations," Id. at 19, and not just among directors. Furthermore, contrary to SCM's suggestion, it seems that Congress in enacting section 8 did not distinguish between the scope of the paragraph addressed to banks and that of the paragraph addressed to industrial corporations, since the Report appears to equate the approach taken by the statute as to both types of corporations:

> In this, *as in the preceding paragraph relating to banks,* it was not deemed necessary or advisable that interlocking directorates should be prohibited between the smaller industrial corporations . . . The concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals *or great corporations* has grown to such an extent . . .. (Emphasis supplied).

Id. Thus, section 8 should not be read with undue literalness, since it is clear that Congress intended to prohibit the large industrial corporations from having interlocked directorates. In sum, based upon the interrelationship of various sections of the Clayton Act, the policy of the statute, the legislative history and the Commission's long-standing administrative practice, we conclude that the Commission's interpretation is sensible and correct.

Anticipating this construction, petitioner further argues that a section 8 order is necessarily limited to ordering the corporation to "rid itself" of the offending director, and that where, as here, the offending director has resigned,

no basis exists for such an order. We have emphasized the "rid itself" language of section 11 to demonstrate the reasonableness of our conclusion that section 8 encompasses corporate violators as well as individual directors. But section 11 as a whole makes it clear that once a violation of the Clayton Act is shown, a cease and desist order concerning future violations may issue, and it is well established that voluntary cessation of a section 8 violation does not of itself preclude injunctive relief. See *United States* v. *W. T. Grant Co., supra,* 345 U.S. at 632-33, 73 S.Ct. 894.

## III

We next consider SCM's argument that even if section 8 applies to it, the Commission erred in entering a broad cease and desist order regulating SCM's future conduct without the showing necessary for injunctive relief. SCM maintains that (1) there is no evidence of any danger of recurrent violation by SCM of the Clayton Act, since Bond resigned as a director of SCM shortly after the complaint was filed, and (2) in any event, under *United States* v. *W. T. Grant, supra,* the Commission applied the wrong legal standard in deciding the issue. For reasons set forth below, we believe that the second of these arguments has sufficient merit to warrant a remand to the Commission.

In *W. T. Grant,* the United States brought an action in a federal district court under section 15 of the Clayton Act [14] to enjoin the defendants from violating section 8. On the basis of defendants' uncontradicted affidavits, which informed the district court that the individual defendant had resigned from the offending directorships and that the

[14] 15 U.S.C. § 25.

corporate defendants had no intent to resume such interlocks, the trial judge granted summary judgment for defendants, 345 U.S. at 635, 73 S.Ct. 894. In affirming that judgment, the Supreme Court discussed a number of issues. First, the Court analyzed the question of mootness and noted that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot," id. at 632, 73 S.Ct. at 897, but added that an action can be mooted if the defendant meets the heavy burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated." Id. The Court then discussed whether the district court had abused its discretion in denying the government injunctive relief. On this issue the Court pointed out that

> [T]he moving party must satisfy the court that relief is needed. *The necessary determination is that there exists some cognizable danger of recurrent violation,* something more than the mere possibility which serves to keep the case alive. (Emphasis supplied)

Id. at 633, 73 S.Ct. at 898. While in many cases there will be no practical difference between dismissing a case for mootness and denying a request for injunctive relief, nevertheless, the two concepts are analytically distinguishable and a court could find that a case is not moot and yet deny injunctive relief.[15]

In the proceeding before the ALJ, SCM contended that the action against it was moot because of Bond's "voluntary" resignation from its board of directors shortly after the complaint issued. The ALJ concluded that the case

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[15] See, e.g., *United States* v. *Newmont Mining Corp.*, 34 F.R.D. 504 (S.D.N.Y. 1964).

against SCM was not moot and that the moving party (the Commission staff) had met its burden of showing that injunctive relief was warranted. On appeal, the Commission affirmed the ALJ, but its opinion contained the following statement:

> [SCM's] position here would necessitate that having shown a violation, complaint counsel then demonstrate by affirmative evidence the likelihood of future additional violations. To the contrary, we think the violation is itself the best evidence of the possibility of future such occurrences, and that *the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order.* . . . (Emphasis supplied).

89 F.T.C. at 66. SCM strenuously urges that this statement, particularly the emphasized portion, is inconsistent with the *Grant* standard and that this error of law requires remand.

The Commission pointed out, as did the ALJ, that SCM promised only not to rehire Bond so long as he is a director of Kraftco or any other corporation with which SCM competes. SCM did not promise to avoid other unlawful interlocks with Kraftco or with anyone else. The Commission also pointed out, as did the ALJ, that "the record discloses nothing of the procedures used by [SCM] to prevent such occurrences . . . ." Under the standard elaborated in *Grant* and frequently followed by us,[16] the ALJ and then the Commission had discretion to find that a cease

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[16] See, e.g., *SEC* v. *Bausch & Lomb, Inc.*, 565 F.2d 8, 18 (2d Cir. 1977); *CFTC* v. *British American Commodity Options Corp.*, 560 F.2d 135, 141 (2d Cir. 1977); *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 806-09 (2d Cir. 1975).

and desist order was warranted.[17] However, as appears from its own decision, the Commission seems to have applied an erroneous standard and confused SCM's burden on the defense of mootness with the FTC staff's burden of showing that an injunction was warranted. This error is indicated by the Commission's statement in its brief that "where a violation of the law has been shown, the burden is upon the defendant to show that injunctive relief is unnecessary," citing *United States* v. *Concentrated Phosphate Export Association, Inc.*, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). But *Concentrated Phosphate* does not stand for so broad a proposition, since that case, like the language from *Grant* it relies upon, dealt with mootness.

Because of this apparent error, we conclude that the proceedings should be remanded to the Commission. Moreover, both SCM and the FTC staff should be given an opportunity upon remand to address themselves to the issue whether "there exists some *cognizable* danger of recurrent violation." (Emphasis supplied). *Grant, supra,* 345 U.S. at 633,[18] 73 S.Ct. at 898.

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[17] The ALJ and the Commission properly pointed out that in *Grant,* 345 U.S. at 634, 73 S.Ct. 894, the Court indicated that had it been the trier of fact, the result might have gone the other way. See 89 F.T.C. at 56 and 65.

[18] We reject SCM's claim that the record was insufficient as a matter of law to support a grant of injunctive relief. SCM's interlock here was longstanding and involved substantial amounts of interstate commerce. Moreover, SCM has not disclosed what steps, if any, it has taken to avoid such interlocks in the future. On the other hand, SCM has not been shown to have violated section 8 after the date Bond resigned from its board of directors and "there is no *per se* rule requiring the issuance of an injunction upon the showing of a past violation." *SEC* v. *Bausch & Lomb, Inc.*, 565 F.2d 8, 18 (2d Cir. 1977). It is for the FTC to weigh these considerations on remand, and we express no view on the merits.

## IV

We turn finally to SCM's contention that the Commission has proceeded against it in discriminatory fashion. SCM first argues that the FTC's use of a formal complaint here constituted prejudicial enforcement of section 8. However, section 11 specifically authorizes the FTC to issue cease and desist orders against section 8 violators. Prior to April 4, 1975, the FTC carried out this mandate under either informal (Part 2) or formal (Part 3) complaint procedures.[19] Since that time, all section 8 complaints, in-including the complaint involved here,[20] have been issued under Part 3.[21] To the extent that SCM's argument is based on the facts that it was one of the first to be subject to the changes in procedure and that the investigation underlying this complaint began before those changes, the argument is without merit. Cf. *Ger-Ro-Mar, Inc.* v. *FTC,* 518 F.2d 33, 35 (2d Cir. 1975). Moreover, we do not see how SCM was prejudiced by the use of one procedure rather than another, since in either case SCM's refusal to consent to an order concerning any interlocking director other than Bond would have spawned this litigation.

SCM also points to the differences between the terms of the consent decree entered by Kraftco[22] and the terms of

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[19] Under then existing Rules of Practice Part 2, the FTC could issue a proposed complaint for the purpose of encouraging settlement before the formal complaint was issued under Rules of Practice Part 3. The FTC could, prior to April 4, 1975, start with either Part 2 or Part 3 complaints and apparently often chose the former. See 40 Fed. Reg. 15235 (1975).

[20] The complaint was issued on June 17, 1975.

[21] See 16 C.F.R. §§ 2.31, 3.1 et seq.; 40 Fed. Reg. 15235 (1975).

[22] SCM also points to the terms of Bond's consent decree, but the terms of that individual director's order are clearly inapposite for purposes of comparison with SCM's order.

the cease and desist order issued against SCM as further evidence of the FTC's unlawful discrimination against SCM. Thus, citing *North Carolina* v. *Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) and its progeny, SCM argues that the FTC has unconstitutionally punished it by imposing substantially harsher terms in the SCM order because of SCM's decision to litigate the merits of this complaint. However, we need not consider whether substantial, inexplicable differences between the terms of orders and decrees arising out of the same violation and entered against seemingly equally culpable violators would constitute an unconstitutional price tag on the exercise of due process rights. Cf. *Dan J. Sheehan Co.* v. *Occupational Safety and Health Review Comm'n,* 520 F.2d 1036 (5th Cir. 1975), cert. denied, 424 U.S. 965, 96 S.Ct. 1458, 47 L.Ed.2d 731 (1976). After a thorough comparison of the orders involved here, we find the differences not sufficiently substantial to raise this constitutional question,[23] especially

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[23] Both Kraftco and SCM were ordered for the next five years to have each director sign written statements effectively disclaiming membership on the board of any competing corporation. To effectuate this requirement, SCM's directors were ordered to submit a list of the other corporations and the products and services of such corporations to SCM, whereas Kraftco was directed to submit a list of its major products to its directors. Kraftco and SCM were further required to file annual compliance statements with the FTC for five and ten years respectively, and both were also required to give the FTC 30 days notice of any corporate change which might affect compliance obligations arising out of the order.

The most substantial difference in the orders was that SCM was expressly enjoined from violating section 8 as regards any company—merely a restatement of SCM's preexisting duty under section 8—whereas the express portion of the Kraftco order only enjoins future violations as regards interlocks with SCM. To some extent, this difference is offset by paragraph 2 of the Kraftco order, which prohibits Kraftco from allowing any director on its board who does not certify that he or she does not serve on the board of any corporation (i.e., not just SCM), which substantially competes with Kraftco.

in light of the FTC's broad discretion in drafting remedial orders. See, e.g., *Fedders Corp.* v. *FTC,* 529 F.2d 1398, 1401-02 (2d Cir.), cert. denied, 429 U.S. 818, 97 S.Ct. 63, 50 L.Ed.2d 79 (1976). Moreover, the differences between the orders are not arbitrary or irrational in light of the facts before the FTC that (1) SCM had been in a better position to avoid the interlock initially, since at the time Bond was made a director at SCM he had lawfully been a member of Kraftco's board for many years, (2) SCM never conceded that it or even Bond had violated section 8, whereas Kraftco immediately appeared more conciliatory on both of these issues, and (3) SCM never promised to avoid unlawful interlocks in the future nor disclosed what steps, if any, had been taken to achieve that end.

We therefore remand this case to the FTC for further proceedings consistent with our opinion.

## Order Denying the Commission's Petition for Rehearing—February 15, 1978

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of February, one thousand nine hundred and seventy-seven. Present:

HON. WILFRED FEINBERG,
HON. WILLIAM H. MULLIGAN,
HON. LEONARD P. MOORE,
*Circuit Judges.*

DOCKET NO. 77-4078

SCM CORPORATION,
*Petitioner,*

v.

FEDERAL TRADE COMMISSION,
*Respondent.*

A petition for a rehearing having been filed herein by counsel for the respondent,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
*Clerk*

## Order Denying the Commission's Petition for Rehearing En Banc—February 15, 1978

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of February, one thousand nine hundred and seventy-eight.

DOCKET NO. 77-4078

SCM CORPORATION,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Federal Trade Commission, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
*Chief Judge*

## Opinion and Final Order of the Commission—October 4, 1978

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 9035

COMMISSIONERS:

Michael Pertschuk, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
David A. Clanton
Robert Pitofsky

In the Matter of
KRAFTCO CORPORATION, a corporation,
SCM CORPORATION, a corporation,
and
RICHARD C. BOND, an individual.

### FINAL ORDER

This matter has been heard by the Commission upon remand from the Second Circuit Court of Appeals. The Commission, for the reasons stated in the accompanying opinion, has determined that an order to cease and desist should be entered. Therefore,

IT IS ORDERED that the following Order to Cease and Desist be, and it hereby is, entered:

### ORDER

The following definitions shall apply in this order:

"Subsidiary" of SCM means any corporation, 50 per-

cent or more of the voting stock of which is owned or controlled, directly or indirectly, by SCM.

"Parent" of SCM means any corporation which owns or controls, directly or indirectly, 50 percent or more of the voting stock of SCM.

"Sister" of SCM means any subsidiary of a parent of SCM.

1. IT IS ORDERED that respondent SCM Corporation and its successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their board of directors any individual who either:

(a) serves at the same time as a director of Kraftco Corporation, its successors or assigns (so long as Kraftco and SCM Corporation compete in the production or sale of any product or service), or serves at the same time as a director of any other corporation (other than a subsidiary, parent, or sister of SCM) which competes with SCM Corporation in the production or sale of any product or service; or

(b)fails to submit to SCM Corporation any statement required by Paragraph Two of this order to be obtained by SCM.

2. IT IS FURTHER ORDERED that within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, SCM Corporation shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each

director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service produced or sold by, each corporation which the director or nominee then serves as a director, or has been nominated to serve as a director at the time of the statement.

The requirements of this Paragraph shall not apply to elections of directors occurring after five years from the effective date of this order, nor shall directors or nominees be required to list products or services of subsidiaries, sisters, or parents of SCM Corporation.

Nothing in this Paragraph shall be construed to relieve respondent of its obligation under Paragraph 1(a) hereto due to any error or omission contained in any written statement received pursuant to this Paragraph.

3. It Is Further Ordered that within forty-five (45) days of the effective date of this order and annually for a period of ten (10) years thereafter, SCM Corporation shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph Two of this order shall be submitted to the Commission as part of the reports of compliance required by this Paragraph during the first five (5) years. Nothing in this Paragraph shall relieve SCM Corporation of its obligation to comply with Paragraphs One and Four of this order once it is no longer required to submit reports of compliance to the Commission.

4. It Is Further Ordered that SCM Corporation shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any

other change in the corporation which may affect compliance obligations arising out of this order.

By direction of the Commission.

SEAL

Carol M. Thomas
Secretary

ISSUED: October 4, 1978

*Opinion and Final Order of the Commission—*
*October 4, 1978*

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 9035

COMMISSIONERS:

Michael Pertschuk, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
David A. Clanton
Robert Pitofsky

In the Matter of
KRAFTCO CORPORATION, a corporation,
SCM CORPORATION, a corporation,
and
RICHARD C. BOND, an individual.

## OPINION OF THE COMMISSION

*By Dixon, Commissioner*

This matter is before the Commission upon remand from the Second Circuit Court of Appeals. The Court affirmed the Commission's earlier determination that respondent SCM has violated Section 8 of the Clayton Act (15 U.S.C. § 18) by virtue of its maintenance of a common director, Richard C. Bond, with a competitor, Kraftco Corporation. *SCM Corporation* v. *Federal Trade Commission,* 565 F. 2d 807 (2d Cir. 1977) . However, the Court remanded the matter to the Commission for further consideration as to whether there exists some cognizable danger of recurrent

violation, a finding that the Court deemed a necessary predicate to any imposition by the Commission of an order to cease and desist. On remand, both sides have filed briefs and reply briefs on this question.

In its original decision in this matter, the Commission, as had the administrative law judge, noted several factors that it believed warranted entry of an order in this case. Among these were the fact that the violation in question had been longstanding in nature, involved more than $80 million in sales by SCM, and was terminated only following issuance of a complaint by the Commission. See 89 FTC 46, 65 (1977). Having made these observations, however, we then went on to state (in addressing SCM's arguments that no order should enter) that

> SCM's position here would necessitate that having shown a violation, complaint counsel then demonstrate by affirmative evidence the likelihood of future additional violations. To the contrary, we think the violation is itself the best evidence of the possibility of future occurrences, and that *the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order.* . . . (89 FTC at 66, emphasis added.)

The underlined wording met with the disapproval of the Court of Appeals, which was concerned that the Commission may have applied an incorrect standard and shifted the burden of proof in determining the need for an order.

Our phraseology was plainly infelicitous. What we intended by our words to convey was that record evidence concerning the nature of the violation and the circumstances surrounding it demonstrated to us the need for an order. In the face of such evidence, it was incumbent

upon respondent to rebut, if it could, complaint counsel's showing that an order should enter.

Having once again reviewed the evidence and carefully considered the submissions of the parties, we adhere to our earlier conclusion that an order is necessary. We find that there is plainly a cognizable danger of recurrent violation of Section 8 of the Clayton Act in this case. Our conclusion is based upon the facts that the law violation which occurred persisted for a period of 7 years, involved markets in which SCM and its interlocked competitor made over $300 million in sales (of which $80 million were SCM's), and was halted only after intervention by the Commission (in this instance, after issuance of the complaint.) In our view, these considerations show that SCM acted without adequate attention to its obligations under the law. Having acted in this fashion in the past, and given that it continues to do business and elect directors, we believe there is cognizable danger that SCM will again neglect to prevent the election and service of an interlocking director absent an order to deter it. See *SEC* v. *Commonwealth Chem. Securities, Inc.*, 574 F.2d 90, 100 (2d Cir. 1978).

In its briefs before the Commission, SCM contends that the grounds cited by complaint counsel, and upon which the Commission relies in finding a danger of recurrent violation, do not constitute "affirmative evidence" in support of the conclusion reached. We disagree.[1] As the Court of Appeals properly reminded us, the mere occurrence of a law violation, however trivial, technical, short-lived, and speedily corrected may not, in and of itself, dictate the

[1] We note that the Court of Appeals specifically rejected SCM's assertion that the record is insufficient as a matter of law to support the issuance of an order, 565 F.2d at 813.

need for remedial action. The Commission's holding in its earlier opinion could fairly have been read to say otherwise. We do believe, however, that with corporations as with individuals, past conduct is probative of future behavior. A driver who carelessly runs over a pedestrian is deemed in need of deterrence lest he repeat his act, even though the only significant proof that he is likely to be careless in the future is the fact that he was careless in the past. The same is true of a careless corporation. That a company would elect to its Board of Directors a member who simultaneously directs a competitor in a market in which the two companies share over $300 million of sales, and that it could retain the director for seven years without detecting, or in any event moving to terminate the interlock, implies to us a degree of disregard for the law's requirements that demands remedy, at least so long as the corporation remains in business and continues to hire directors. If there are genuinely extenuating circumstances, the corporation is peculiarly well suited to suggest what they are.[2] Absent such rebuttal, the inference of cognizable danger of recurrent violation must stand.

For its part, SCM has failed to cite any evidence that might tend to overcome the showing made by complaint counsel. Indeed, what SCM has presented adds to our concern that it may again violate the law in the future. In particular, SCM has promised only to refrain from returning Mr. Bond to its board so long as he directs Kraftco or any other competitor of SCM. SCM has not promised to

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[2] An example of such extenuating circumstances in an interlock case might be that the corporation in fact maintained rigorous procedures for avoiding interlocks, but such procedures proved inadequate to detect the interlock as the result of circumstances beyond the corporation's reasonable control.

refrain from other interlocks with either Kraftco or any other competitor of SCM, nor has it indicated that it now has or has ever had *any* procedures whatsoever (let alone adequate procedures) for ensuring that it does not violate Section 8 in its choice of directors.[3]

We are also unpersuaded by SCM's suggestion that the allegedly peculiar nature of Section 8 violations (which harm the public only insofar as they create the potential for anticompetitive abuse), the alleged impossibility of hiding such violations, and their alleged infrequency militate against imposition of an order. It cannot be subject to serious dispute, we believe, that the efforts of federal antitrust agencies to ensure adherence to the antitrust laws depend heavily for their success upon corresponding efforts by the private sector to avoid such violations. It is much more costly for the Federal Trade Commission to determine whether any of SCM's directors simultaneously directs a compteitor of SCM than it would be for SCM (which presumably knows who its competitors are) to make the same determination. Unless it is able to create strong monetary incentives for companies which have demonstrated disregard for the law's requirements to maintain such regard in the future, this agency and any other law enforcement agency is relegated to the role of publicly-subsidized house counsel, capable only of spotting violations (to the extent the resources to do so exist) but unable to do more than exhort the violator to mend its ways. We find no precedent to suggest that violations of Section 8 are to be regarded

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[3] We do not mean to suggest that promises made after a Commission investigation has begun are sufficient to obviate the need for an order, *SCM Corp.* v. *FTC*, *supra*, 565 F.2d at 812, but in this case the limited nature of the promise that was made is further grounds for concern.

less seriously than any others, or that this agency's ability to enter an order to prevent their recurrence should be subjected to a different standard from that applicable to any other violation of law.

Our conclusions are, we believe, consistent with the mandate of the Court of Appeals, as well as with the teaching of numeorus prior decisions which hold that the Commission is empowered to enter an order to cease and desist in circumstances in which the violator has discontinued the illegal conduct and volunteered not to repeat it. *E.g., Fedders Corp.* v. *FTC,* 529 F.2d 1398, 1403 (2d Cir.), *cert. denied,* 429 U.S. 818 (1976); *William H. Rorer, Inc.* v. *FTC,* 374 F.2d 622, 625-26 (2d Cir. 1967); *Coro, Inc.* v. *FTC,* 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965); *Hershey Chocolate Corp.* v. *FTC,* 121 F.2d 968, 971 (3d Cir. 1941); *Perma-Maid Co.* v. *FTC,* 121 F.2d 282, 284-85 (6th Cir. 1941); *Sears, Roebuck & Co.* v. *FTC,* 258 F. 307, 310 (7th Cir. 1919); *FTC* v. *Wallace,* 25 F.2d 733, 738 (8th Cir. 1935).

The order we have entered is identical to the one previously issued. The terms of that order were reviewed by the Commission in the original proceeding, and upon appeal the Court of Appeals expressed no objection, assuming that any order should be deemed appropriate.

DATED: October 4, 1978

## Opinion of the Court of Appeals— 612 F.2d 707 (2d Cir. 1980)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 211, Docket No. 78-4207

SCM CORPORATION,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

Argued December 12, 1979
Decided January 14, 1980

WILLIAM E. WILLIS, New York, N.Y. (Sullivan & Cromwell, New York, N.Y., James E. Tyrrell, New York, N.Y., of Counsel, Milton Wolson, New York, N.Y., on the brief), for Petitioner.

DAVID C. SHONKA, Attorney, Federal Trade Commission, Washington, D.C. (Michael N. Sohn, General Counsel, W. Dennis Cross, Deputy General Counsel, Federal Trade Commission, Washington, D.C., of Counsel), for Respondent.

Before: LUMBARD, FEINBERG and VAN GRAAFEILAND, Circuit Judges.

Petition for review of a final order of the Federal Trade Commission enjoining petitioner from future violations of the Clayton Act.

Denied.

*Opinion of the Court of Appeals—*
*612 F.2d 707 (2d Cir. 1980)*

PER CURIAM:

SCM Corporation seeks review of a final order and opinion of the Federal Trade Commission, dated October 4, 1978, enjoining SCM from permitting interlocking directorates in violation of section 8 of the Clayton Act. On a previous review in this court of an identical order by the Commission, we remanded the case for reconsideration because of a concern that the Commission may have incorrectly placed the burden on SCM to show that an injunction was not warranted. SCM Corporation v. Federal Trade Commission, 565 F.2d 807 (2d Cir. 1977). On remand, the Commission was to consider whether there was "some cognizable danger of recurrent violation" that would justify the injunction. The Commission, upon reconsideration, reimposed the cease and desist order. SCM now argues that the Commission failed to follow our instructions on remand and erred in reinstating the order. However, based on our review of the Commission's final decision, we find that the correct legal standard was applied. Moreover, this court has already held that the evidence in the record is sufficient to justify the imposition of the Commission's order under the proper legal standard. Id. at 813 n.18. The other arguments pressed by SCM on this appeal were also conclusively resolved in the prior opinion of this court.

The petition for review is denied and the order of the Commission is enforced.

Supreme Court, U.S.
FILED
JUN 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1599

# In the Supreme Court of the United States

OCTOBER TERM, 1979

SCM CORPORATION, PETITIONER

*v.*

FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
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INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statutes involved | 2 |
| Questions presented | 2 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 12 |
| Appendix | 1a |


CITATIONS

Cases:


| | |
|---|---|
| *Bordenkircher* v. *Hayes*, 434 U.S. 357 | 12 |
| *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182 | 11 |
| *Colautti* v. *Franklin*, 439 U.S. 379 | 6 |
| *Corbitt* v. *New Jersey*, 439 U.S. 212 | 12 |
| *Coro, Inc.* v. *FTC*, 338 F. 2d 149, cert. denied, 380 U.S. 954 | 10 |
| *Fedders Corp.* v. *FTC*, 529 F. 2d 1398, cert. denied, 429 U.S. 818 | 10 |
| *FTC* v. *Brown Shoe Co.*, 384 U.S. 316 | 8 |
| *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 | 11 |
| *FTC* v. *National Lead Co.*, 352 U.S. 419 | 11 |
| *FTC* v. *Ruberoid Co.*, 343 U.S. 470 | 11 |

Page

Cases—(Continued):

*FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 ..... 8

*FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244 ..... 11

*Grand Union Co.* v. *FTC*, 300 F. 2d 92 ..... 8

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*Reiter* v. *Sonotone Corp.*, 442 U.S. 330 ..... 6

*United States* v. *Armour & Co.*, 402 U.S. 673 ..... 11

*United States* v. *Crocker Nat'l Corp.*, 422 F. Supp. 686 ..... 7

*United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316 ..... 11-12

*United States* v. *ITT Continental Baking Co.*, 420 U.S. 233 ..... 11

*United States* v. *Parke, Davis & Co.*, 362 U.S. 29 ..... 9

*United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614 ..... 7

*United States* v. *Sears, Roebuck & Co.*, 165 F. Supp. 356 ..... 7

Page

Cases—(Continued):

*United States* v. *Sears, Roebuck & Co.*, [1952-1953 Transfer Binder] Trade Cas. (CCH) para. 67,561 ..... 7

*United States* v. *W. T. Grant Co.*, 345 U.S. 629 ..... 8, 9

*William H. Rorer, Inc.* v. *FTC*, 374 F. 2d 622 ..... 10

Statutes:

Clayton Act, 15 U.S.C. 12 *et seq.* :

Section 1, 15 U.S.C. 12 ..... 2, 6, 1a

Section 8, 15 U.S.C. 19 ..... 2, 3, 5, 6, 8, 9

Section 11, 15 U.S.C. 21 ..... 2, 5, 6, 8

Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* :

Section 5, 15 U.S.C. 45 ..... 3

Section 5(a), 15 U.S.C. 45(a) ..... 8

Section 5(a)(1), 15 U.S.C. 45(a)(1) ..... 2, 1a

Miscellaneous:

H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914) ..... 6

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-1599

SCM CORPORATION, PETITIONER

*v.*

FEDERAL TRADE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 78a-79a) is reported at 612 F. 2d 707. An earlier opinion of the court of appeals (Pet. App. 51a-65a) is reported at 565 F. 2d 807. The order and opinion of the Federal Trade Commission (Pet. App. 68a-77a) are reported at 92 F.T.C. 416. An earlier opinion and order of the Commission (Pet. App. 32a-50a) are reported at 89 F.T.C. 60. The decision and order of the administrative law judge (Pet. App. 4a-26a) are reported at 89 F.T.C. 46.

### JURISDICTION

The judgment of the court of appeals was entered on January 14, 1980. The petition for a writ of certiorari was filed on April 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

Sections 8 and 11 of the Clayton Act, 15 U.S.C. 19 and 21, are set forth in the Appendix to the petition (Pet. App. A-4 to A-6). Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), are set forth in the Appendix to this brief.

## QUESTIONS PRESENTED

1. Whether Sections 8 and 11 of the Clayton Act empower the Federal Trade Commission to terminate and prevent interlocking directorates among competing corporations by issuing orders against offending corporations as well as offending directors.

2. Whether the Commission abused its discretion by ordering petitioner to cease and desist from maintaining interlocking directorates with competing corporations after the offending interlock was terminated.

3. Whether differences between a consent order negotiated by another corporation involved in petitioner's violation and the adjudicated order entered against petitioner establish unconstitutional discrimination.

## STATEMENT

In June 1975, the Federal Trade Commission issued an administrative complaint against petitioner SCM Corporation, Kraftco Corporation, and Richard C. Bond, alleging, *inter alia*, that each of them had violated Section 8 of the Clayton Act (15 U.S.C. 19) and Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) by virtue of Bond's service on the boards of directors of both SCM and Kraftco.[1] Soon after the Commission

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[1]Kraftco and SCM compete directly in the sale of various food products. In fiscal 1975, SCM sold more than $83 million of food

issued its complaint, Bond resigned from SCM's board. Kraftco and Bond subsequently consented to the entry against them of cease-and-desist orders (Pet. App. 36a-37a). SCM admitted that a violation of Section 8 had occurred, but contested the complaint against it on the theory that Section 8 does not apply to corporations. SCM tendered a statement, however, which indicated that it would not rehire Bond so long as SCM and Kraftco continue to compete (Pet. App. 44a n.5).

The complaint against SCM was litigated upon a stipulated record before an administrative law judge. The administrative law judge found that SCM had violated Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act (Pet. App. 37a). The Commission affirmed the administrative law judge's finding and entered a cease-and-desist order based upon both statutory provisions (Pet. App. 36a-50a).

On SCM's petition for review, the court of appeals held (1) that Section 8 of the Clayton Act applies to corporations as well as natural persons; (2) that the Commission had not abused its discretion by entering an order against SCM following Bond's resignation and SCM's statement that it would not rehire Bond; (3) that there was evidence establishing a danger of recurrent violations by SCM; and (4) that the Commission had properly entered an order against SCM that differed from, and in some respects was more burdensome than, the negotiated consent order entered against Kraftco (Pet. App. 57a-59a, 61a-62a, 64a-65a).

The court of appeals expressed concern, however, about a statement in the Commission's opinion indicating that SCM had the burden of proving that a remedial

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products in competition with Kraftco. Kraftco's sales of the same products, in competition with SCM, were approximately $258 million (Pet. App. 52a, 37a).

order was unnecessary in this case.[2] It concluded that the imposition of such a burden might be proper with respect to SCM's claim that the proceeding was moot, but would be improper with respect to SCM's claim that injunctive relief was unwarranted because there was no danger of recurrent violations (Pet. App. 62a).[3] Because the court believed that the Commission "may have applied the wrong legal standard in entering a cease and desist order against SCM" (Pet. App. 51a-52a), it remanded the case to the Commission (Pet. App. 62a). While the court rejected SCM's contention that the record was insufficient to support the entry of a cease-and-desist order, it directed that the parties "should be given an opportunity upon remand to address themselves to the issue whether 'there exists some *cognizable* danger of recurrent violation' " (Pet. App. 62a & n.18).

On remand, the Commission reopened the proceeding to determine whether there was a cognizable danger of a recurrent violation by SCM (Pet. App. 72a-73a). The Commission thereafter issued an opinion stating that it "adhere[d] to [its] earlier conclusion that an order is necessary [because] there is plainly a cognizable danger of recurrent violation of Section 8 of the Clayton Act in this case" (Pet. App. 74a). Accordingly, the Commission entered an order against SCM identical to its prior order (compare Pet. App. 32a-35a with Pet. App. 68a-71a).

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[2]The Commission had stated (Pet. App. 46a):

> Respondent's position here would necessitate that having shown a violation, complaint counsel then demonstrate by affirmative evidence the likelihood of future additional violations. To the contrary, we think the violation is itself the best evidence of the possibility of future such occurrences, and that the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order.

[3]SCM had advanced a mootness argument before the Commission but abandoned that argument on appeal (Pet. App. 60a-61a).

On SCM's petition for review, the court of appeals held in a per curiam opinion that the Commission had applied "the correct legal standard" in imposing a remedial order. The court explained that it had already held that "the record is sufficient to justify the imposition of the Commission's order," and that SCM's remaining objections "were also conclusively resolved in the prior opinion of this court" (Pet. App. 79a).

## ARGUMENT

The decision of the court of appeals conflicts with no decision of this Court or any other court of appeals. The decision is correct, and further review by this Court is not warranted.

1. Petitioner contends (Pet. 7-9) that corporations are not subject to remedial orders under Sections 8 and 11 of the Clayton Act, 15 U.S.C. 19 and 21. The initial decision of the court of appeals, on which we principally rely, correctly rejected that contention (see Pet. App. 53a-59a).

The plain meaning of the language used by Congress in Sections 8 and 11 of the Clayton Act supports the conclusion of the court of appeals. Section 8 of the Act provides, *inter alia*, that no person shall serve as a director of two or more corporations engaged in commerce, if one of the corporations has capital surplus and undivided profits aggregating more than $1 million and if the corporations are competitors. Section 8 does not, on its face, specify whether individual directors alone are liable to remedial orders if they violate the statute, or whether corporations involved in forbidden interlocks are likewise liable. However, Section 11 of the Act clearly establishes that corporations are liable for violations of Section 8. Section 11 states that, upon finding a violation of Section 8, the Commission may issue "an order requiring such person to cease and desist from such

violations, *and * * * rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act*" (emphasis supplied). 38 Stat. 735, 15 U.S.C. 21(b) (emphasis supplied). Section 1 of the Clayton Act, 15 U.S.C. 12, expressly provides that the word "person" includes "corporations."

Sections 1, 8 and 11 of the Clayton Act are *in pari materia* and must be read together to ascertain the statute's meaning. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). To adopt petitioner's construction and limit the statute to natural persons would deprive Sections 1 and 11 of their plain meaning "in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979). Giving the words used by Congress their ordinary meaning and considering their interrelationship, it is plain the Congress intended not only to prohibit individuals from serving on interlocking boards, but also intended to prohibit corporations from selecting individuals to serve who are disqualified by the provisions of Section 8.[4]

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[4]Contrary to petitioner's assertion (Pet. 7-10), the court of appeals did not base it decision on its own "policy" views. To the contrary, the court expressly stated (Pet. App. 58a) that its decision was "based upon the interrelationship of various sections of the Clayton Act, the policy of the statute, the legislative history and the Commission's long-standing administrative practice * * *." The legislative history (summarized at Pet. App. 57a-58a, 38a-39a & n.2) reinforces the plain meaning of the statutory language. For example, the House Report that accompanied the Clayton Act stated that Congress believed that a two-year grace period was required "in order that the corporations affected may have ample time to readjust their boards of directors * * *." H.R. Rep. No. 627, 63d Cong., 2d Sess. 18 (1914). The Committee was thus of the view that it was incumbent upon corporations themselves to achieve compliance with the requirements of Section 8.

A contrary interpretation would conflict with the purpose of Section 8, which was intended "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates" (Pet. App. 57a, quoting *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953)). The court of appeals thus correctly affirmed the Commission's conclusion that (Pet. App. 41a, 55a-56a):

> To absolve corporations of liability for sharing directors with competitors would, without question, severely undermine enforcement of the law, since any corporation could maintain such an interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member, again without fear that detection could lead to anything more than the director's resignation. Sanctions against individuals alone are likely to be of limited effect, because there are hundreds of thousands of potential corporate directors at any given time. Sanctions against a much smaller number of corporations are far likelier to effectuate the purposes of Section 8, since an order against a corporation will prevent a far larger number of potential interlocks than one against an individual.

Every other court that has considered this question has reached the same result. See *United States* v. *Crocker Nat'l Corp.*, 422 F. Supp. 686, 705-706 (N.D. Cal. 1976); *United States* v. *Sears, Roebuck & Co.*, *supra*; see also *United States* v. *Sears, Roebuck & Co.*, 165 F. Supp. 356, 357-359 (S.D.N.Y. 1958); *United States* v. *Sears, Roebuck & Co.*, [1952-1953 Transfer Binder] Trade Cas. (CCH) para. 67,561. Cf. *Protectoseal Co.* v. *Barancik*, 484 F. 2d 585, 588 (7th Cir. 1973) (noting that "[t]he corporation

itself is a potential defendant in litigation which the government may initiate to enforce § 8").[5]

2. Petitioner also argues (Pet. 10-13) that the court of appeals improperly affirmed the remedial order in this case because the record does not establish the need for a remedy. However, the court of appeals correctly held (Pet. App. 79a, 59a-62a) that the Commission's decision to issue a cease-and-desist order was not an abuse of discretion under *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953). *Grant*, like the present case, involved illegal interlocking directorates. The district court dismissed the complaint after finding that the illegal interlock had been eliminated and that there was not "the slightest threat that the defendants will attempt any future activity in violation of Section 8" (*id.* at 630-631). On direct appeal to this Court, the government contended that an injunction was appropriate because the defendant failed to remedy the violation over a five-year period and did not do so until a complaint was filed. The government also pointed to the defendant's failure to concede the illegality of the interlock and to give assurances against a repetition of the violation (*id.* at 633-634). This Court held that such arguments may well be persuasive at the trial court level, but were not a ground for disturbing the remedial discretion of the trial court on appeal (*ibid.*).

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[5]In any event, even if there were merit to petitioner's claim that only natural persons are subject to remedial orders under Sections 8 and 11 of the Clayton Act, the order against petitioner in the present case is sustainable on an independent statutory basis. The Commission found that the challenged director interlock violated Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a). See Pet. App. 42a-44a. Corporations are clearly subject to remedial orders under that provision. See, *e.g.*, *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 320-321 (1966); *Grand Union Co.* v. *FTC*, 300 F. 2d 92, 94 (2d Cir. 1962). Petitioner does not challenge the Commission's determination that it violated Section 5 of the Federal Trade Commission Act.

The stipulated record in the present case shows that petitioner's violation of Section 8 continued for several years and ended only after the Commission issued a complaint challenging the interlock (Pet. App. 8a-9a, 44a, 52a-53a, 74a). The record also shows that the extent of competition between Kraftco and petitioner is substantial (*ibid.*), and that petitioner, which could violate the law again by entering into another interlocking directorate, has refused to make any binding commitment not to do so in the future. Indeed, petitioner persists in the view that corporations have no responsibility to comply with Section 8 of the Clayton Act. In view of this evidence, and petitioner's refusal to present contrary assurances indicating that a remedy is unnecessary (Pet. App. 75a-76a), the Commission correctly found "a degree of disregard for the law's requirements that demands [a] remedy" (*id.* at 75a), and properly noted that petitioner's conduct in this case only added to the "concern that [petitioner] may again violate the law" (*ibid.*).

As the court of appeals found (Pet. App. 62a n.18), the record in this case is sufficient "as a matter of law to support a grant of injunctive relief" under *W.T. Grant*. It was for the Commission, in the exercise of its sound discretion, to weigh the competing considerations bearing on the risk of a recurrent violation (*ibid.*). Like the decision of the district court in *W.T. Grant*, the decision of the Commission may be overturned only if the record evidence does not reasonably sustain it. This essentially factual question was carefully analysed by the court of appeals. Since both the Commission and the court of appeals applied the *W.T. Grant* standard to the facts of this particular case, there is no reason for this Court to consider whether the findings of the Commission, as affirmed by the court of appeals, were erroneous. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48

(1960); *Fedders Corp.* v. *FTC*, 529 F. 2d 1398, 1403 (2d Cir.), cert. denied, 429 U.S. 818 (1976); *William H. Rorer, Inc.* v. *FTC*, 374 F. 2d 622, 625-626 (2d Cir. 1967); *Coro, Inc.* v. *FTC*, 338 F. 2d 149, 153-154 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965).

3. Petitioner finally argues (Pet. 14-16) that certain differences between the consent order negotiated by Kraftco and the adjudicated order ultimately entered against petitioner manifest unconstitutional discrimination by the Commission.

With the benefit of full briefing on this issue, the court of appeals has twice considered the differences between the Commission's adjudicated order against petitioner and the consent order against Kraftco, and has concluded that the differences are not legally material and are fully justified (Pet. App. 63a-65a & nn.19-23, 79a). As the court of appeals explained (*id.* at 64a-65a):

> After a thorough comparison of the orders involved here, we find the differences not sufficiently substantial to raise [a] constitutional question, especially in light of the FTC's broad discretion in drafting remedial orders. * * * Moreover, the differences between the orders are not arbitrary or irrational in light of the facts before the FTC * * *.[6]

The court observed that Richard Bond had served on Kraftco's board before serving on petitioner's board, and that petitioner therefore was in a better position than Kraftco to avoid the interlock in the first place. The court also noted that Kraftco had been conciliatory throughout this litigation and displayed a willingness to avoid future

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[6]Petitioner has not contended that the Commission's remedial order, which requires the prevention of future illegal interlocks, places the company at a competitive disadvantage in the marketplace.

infractions, while petitioner had been unwilling to assure the Commission that it would avoid unlawful interlocks in the future. Indeed, petitioner was unwilling to "disclose[] what steps, if any, had been taken to achieve that end" (Pet. App. 65a).

The decisions of this Court establish that the Commission possesses broad discretion in fashioning remedies that are suited to the facts of particular cases. See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957); *FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611-613 (1946). And it is also well established that the Commission need not impose identical sanctions even against similarly situated violators. See, *e.g.*, *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413-414 (1958); see also *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-189 (1973). These principles support the court of appeals' conclusion that the Commission did not abuse its discretion by adjusting its remedy to the necessities of the present case.

In any event, there is no substance to petitioner's assertion that the terms of adjudicated orders must be the same as those of consent orders in related cases. Consent orders are the product of negotiation and compromise. "[I]n exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971); *United States* v. *ITT Continental Baking Co.*, 420 U.S. 233, 235-237 (1975). In contrast, an adjudicated order is expected to provide complete relief "to prevent the evils aimed at by the original complaint." *United States* v. *Armour & Co.*, *supra*, 402 U.S. at 681. Cf. *United States*

v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326-327, 354 (1961). Thus, the differences that exist between the consent order and the fully litigated order involved here reflect the implementation of sound enforcement principles, not unconstitutional discrimination.[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1980

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[7]In reliance on decisions arising in the criminal law context (Pet. 14), petitioner claims that it is a violation of the Due Process Clause to impose a more stringent remedial order on a party that goes to trial than a party that settles its dispute with the government. However, this Court has recognized that the "give and take" of negotiation often result in differences between sanctions imposed against parties who settle and those who exercise their right to trial. See, *e.g.*, *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363-365 (1978); *Corbitt* v. *New Jersey*, 439 U.S. 212, 218-224 (1978).

## APPENDIX

1. Section 1 of the Clayton Act, 15 U.S.C. 12, provides in pertinent part:

* * * * *

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

* * * * *

2. Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), provides:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-1599

IN THE

# Supreme Court of the United States

October Term, 1979

SCM CORPORATION,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

## REPLY BRIEF OF PETITIONER SCM CORPORATION IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

# Supreme Court of the United States

**October Term, 1979**

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v.

FEDERAL TRADE COMMISSION,

*Respondent.*

## REPLY BRIEF OF PETITIONER SCM CORPORATION IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner SCM Corporation ("SCM") submits this brief in response to the "BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION." In its Petition, dated April 12, 1980, SCM set forth the facts and legal analysis upon which it bases its request for issuance of a writ of certiorari. While SCM continues to rely upon the analysis contained in its Petition, SCM submits the present brief to correct certain inaccuracies which appear in the Federal Trade Commission's ("FTC" or "Commission") brief opposing SCM's Petition.

## I

With regard to SCM's second and third reasons for granting a writ of certiorari (that the FTC entered a

permanent injunction against SCM without compliance with the proper standard for injunctive relief and that the FTC entered a more burdensome order against SCM than against Kraftco to punish SCM for exercising its due process right to a hearing), the FTC has premised its rebuttal upon an error or mischaracterization of fact. The Commission argues "that petitioner, which could violate the law again by entering into another interlocking directorate, has refused to make any binding commitment not to do so in the future." (FTC Br. at 9).*

To the contrary, SCM has never refused to provide the Commission with a commitment to refrain from violating Section 8 in the future. As the record in this case reflects, SCM offered the Commission voluntary assurances of future compliance with Section 8 by affidavit as early as November 16, 1975. (Sexton Aff., para. 10).** The voluntary assurance that SCM provided to the Commission closely paralleled the consent order that the FTC accepted as being in the public interest in the case of Mr. Bond. Throughout the proceedings in this case, the FTC Staff never requested a broader representation from SCM or even suggested that it would recommend any resolution of this case short of the cease and desist order that ultimately issued. Under such circumstances, it is fundamentally misleading for the FTC now to suggest to this Court that SCM "refused" to provide

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* The FTC repeats this argument in an effort to justify the disparate treatment afforded to SCM and Kraftco: "petitioner had been unwilling to assure the Commission that it would avoid unlawful interlocks in the future." (FTC Br. at 11).

** As noted in SCM's Petition at 4 n., "[s]uch a voluntary assurance of future compliance was specifically contemplated by Section 2.21 of the Commission's Rules of Practice then in effect."

assurances that it would not again violate Section 8 and that such non-existent "refusal" constitutes "evidence" of the need for a permanent injunction against SCM.

## II

In its Petition, SCM stated that the statutes involved in this case are Sections 8 and 11 of the Clayton Act, 15 U.S.C. §§ 19 and 21. (Pet. at 3). In its answering brief, the FTC asserts that Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) is also involved in this petition. (FTC Br. at 2). The FTC's explanation for the asserted relevance of Section 5 appears in a footnote as follows:

> "[E]ven if there were merit to petitioner's claim that only natural persons are subject to remedial orders under Sections 8 and 11 of the Clayton Act, the order against petitioner in the present case is sustainable on an independent statutory basis. The Commission found that the challenged director interlock violated Section 5(a) of the Federal Trade Commission Act . . . . Petitioner does not challenge the Commission's determination that it violated Section 5 of the Federal Trade Commission Act." (FTC Br. at 8 n.5).

The Commission is in error in maintaining that Section 5 provides an "independent statutory basis" for sustaining the Commission's order against SCM. Section 5 has not been involved in this proceeding at least since the Second Circuit held in its first opinion in this case that its ruling concerning Section 8 obviated the need to consider whether or not Section 5 was applicable and, if so, whether SCM had violated that statute (53a n.2). On remand, neither SCM nor the FTC even discussed the applicability of

Section 5 to the present case.* Likewise, there was no mention of Section 5 in the Commission's Opinion and Final Order (68-77a). No issue concerning Section 5 was briefed either by SCM or by the FTC on SCM's second petition for review to the Second Circuit.** And, the Court of Appeals made no mention of Section 5 in its second opinion in this case, stating instead that SCM was seeking review of an order "enjoning SCM from permitting interlocking directorates in violation of *Section 8* of the Clayton Act" (emphasis added) (79a). In short, Section 5 does not afford an "independent statutory basis" for sustaining the FTC's order against SCM—the authority for which must be based on Section 8, if at all.

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* In a footnote to its brief on remand, SCM specifically preserved its position regarding Section 5:

> "SCM assumes that the Commission will be proceeding on this remand under Section 8 and not under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. On appeal to the Second Circuit SCM argued that Section 5 does not extend to regulation of interlocking directorates. Because of its holding regarding Section 8, the Court did not reach SCM's argument on Section 5. However, if the Staff urges or the Commission decides that this remand should proceed under Section 5, or jointly under Sections 8 and 5, SCM reserves the right to reiterate its Section 5 arguments." (SCM Br. on Remand at 11 n.).

Neither the Staff nor the Commission ever responded to SCM's statement regarding Section 5 or otherwise indicated that Section 5 was still involved in the case.

** In its brief to the Court of Appeals, SCM again noted that "the Commission appears to have proceeded only under Section 8." (SCM Br. at 4 n.4).

## Conclusion

For the reasons set forth herein and in SCM's Petition, SCM respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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